(1)

No. 90-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,

Petitioner,

—v.—

JOHN E. JOHNSON, *et ux.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in a product liability action the Second Circuit misapprehended and misapplied the controlling New York law by upholding an award of punitive damages predicated upon merely negligent, rather than reckless or intentional, conduct by the defendants.

2. Whether in a "failure to warn" product liability action the Second Circuit misapprehended and misapplied the controlling New York law by evaluating a defendant's knowledge of risks posed by its product on the basis of "state of the art" evidence developed after the defendant's manufacture of, and plaintiff's last exposure to, that product.

3. Whether the Second Circuit erred in affirming the district court's consolidation for trial of two markedly dissimilar "failure to warn" product liability actions involving, *inter alia*, entirely different periods of exposure to the product as well as significantly different "state of the art" proofs.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings below included petitioner, The Celotex Corporation (defendant-appellant below), and respondents John E. Johnson and Anne Marie Johnson, his wife (plaintiffs-appellees below).

Owens-Illinois, Inc. was a defendant-appellant in the proceedings below, but does not intend to participate as a petitioner or respondent with respect to the filing of this petition. (Counsel for petitioner represented Owens-Illinois, Inc. in the court of appeals with respect to the filing of a petition for rehearing and subsequent proceedings).

Raymark Industries, Inc. was a defendant in the district court proceedings, but was not a party to the appeal to the Second Circuit since the filing of an involuntary bankruptcy petition stayed all proceedings as to that party. (See Statement of the Case at page 6 *infra*.)

Pursuant to Rule 29.1, The Celotex Corporation states that its parent company is Jim Walter Corporation. Petitioner has no affiliates or other than wholly owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
I. THE SECOND CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING NEW YORK LAW BY UPHOLDING AN AWARD OF PUNITIVE DAMAGES PREDICATED UPON MERELY NEGLIGENT, RATHER THAN RECKLESS OR INTENTIONAL, CONDUCT	8
A. Proceedings in the Court of Appeals	8
B. The Court of Appeals' Adjudication of the Punitive Damages Issue in the Case at Bar Calls for an Exercise of this Court's Power of Supervision	15

PAGE

II. THE SECOND CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING NEW YORK LAW BY EVALUATING DEFENDANT'S KNOWLEDGE OF THE RISKS POSED BY ITS PRODUCTS ON THE BASIS OF "STATE OF THE ART" EVIDENCE DEVELOPED AFTER DEFENDANT'S MANUFACTURE OF, AND PLAINTIFF'S LAST EXPOSURE TO, THOSE PRODUCTS 17

III. THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S CONSOLIDATION FOR TRIAL OF TWO MARKEDLY DISSIMILAR FAILURE TO WARN PRODUCT LIABILITY ACTIONS INVOLVING, INTER ALIA, ENTIRELY DIFFERENT PERIODS OF EXPOSURE TO THE PRODUCT AND SIGNIFICANTLY DIFFERENT STATE OF THE ART PROOFS 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: PAGE

Bolm v. Triumph Corp., 71 A.D.2d 429, 422 N.Y.S.2d 969 (N.Y. App. Div. 1979) 4, 17, 22

Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989) 16

Dupont v. Southern Pacific Co., 366 F.2d 193 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967) 20

Higgins v. The Celotex Corp., No. CV-87-0537 (S.D.N.Y.) ..... 3, 5, 17, *passim*

In re Joint Eastern and Southern Districts Asbestos Litigation, 124 F.R.D. 538 (E.D.N.Y. 1989) 2

Johnson v. The Celotex Corp., Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990) (Carman, U.S.C.I.T., sitting by designation, [original] opinion of the court) ..... 1, 6, 7, 9, *passim*

Johnson v. The Celotex Corp., Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990) (Mahoney, C.J., [original opinion] concurring in part and dissenting in part) ..... 1-2, 6, 7, 8, *passim*

Johnson v. The Celotex Corp., 899 F.2d 1281 (2d Cir. 1990) ["corrected" majority opinion and "revised" concurrence and dissent] ..... 2, 3, 4, *passim*

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 10, 11, 12, 13, 16

Constitutional provision:

U.S. Const. amend. XIV, § 1 ..... 6, 16

PAGE

Statutes:

28 U.S.C. § 1332 (1982) 2

28 U.S.C. § 1254(1) (1982) 2

N.Y. Penal Law § 15.05(3) (McKinney 1987).....11, 12

Rules:

Fed. R. Civ. Pro. 42 19

Miscellaneous Authorities:

Bordens & Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, Judicature (June-July, 1989)..... 23

D. Herr, R. Haydock & J. Stempel, *Motion Practice* (1st ed. 1985)..... 20

W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* (5th ed. 1984).... 9, 10

Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brooklyn L. Rev. 365 (1984) 16

9 C. Wright & A. Miller, *Federal Practice and Procedure* (1971 & Supp. 1990)..... 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Celotex Corporation [hereinafter "Celotex"], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 20, 1990.

OPINIONS BELOW

The original majority opinion of the United States Court of Appeals for the Second Circuit,[1] as well as the separate

1 The opinion of the court was written by the Honorable Gregory W. Carman, Judge of the United States Court of International Trade, sitting by designation. The Honorable Roger J. Miner, Circuit Judge, joined in that opinion.

opinion of the Honorable J. Daniel Mahoney, C.J., concurring in part and dissenting in part, are unpublished and appear in slip opinion form in the appendix hereto at pages 1a to 22a, and 22a to 26a, respectively.[2] The "corrected" majority opinion (Pet. App. 28a-49a) and Judge Mahoney's "revised" concurrence and dissent (Pet. App. 49a-52a) issued shortly before denial of Celotex's petition for rehearing before the panel and *en banc* are reported at 899 F.2d 1281.

The "memorandum and order" of the United States District Court for the Eastern and Southern Districts of New York addressing defendants' post trial motions is published under the caption *In re Joint Eastern and Southern Districts Asbestos Litigation*, 124 F.R.D. 538 (E.D.N.Y. 1989) and is reprinted in the appendix hereto at Pet. App. 53a-66a.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. On April 3, 1990 Celotex filed a timely petition for rehearing before the panel with a suggestion of rehearing *en banc* which was denied by order dated May 24, 1990. Pet. App. 67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

Federal Rule of Civil Procedure 42 is set forth at Pet. App. 70a.

STATEMENT OF THE CASE

Plaintiffs John Johnson and Ann Marie Johnson, his wife, filed a diversity[3] action in district court alleging personal

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2 Hereinafter citations to the appendix will be stated as "Pet. App. ____a."

3 Jurisdiction in district court was predicated upon diversity of citizenship. 28 U.S.C. § 1332 (1982).

injury and loss of consortium due to Mr. Johnson's occupational exposure from 1942-45 to asbestos-containing products allegedly supplied by defendants and a number of other corporations. Mr. Johnson's action, like those of many other claimants in New York's federal and state courts, was filed pursuant to a New York state one-year revival statute for asbestos and various toxic tort actions. See corrected majority opinion at Pet. App. 30a-31a. To manage the substantial asbestos docket generated by that revival statute, the United States District Courts for the Eastern and Southern Districts of New York assigned all pretrial matters pertaining to such cases to the Honorable Charles P. Sifton, U.S.D.J.[4]

On November 4, 1988—three days before trial of the *Johnson* case was to begin—Judge Sifton proposed that it be consolidated with another case involving allegations of exposure to asbestos products, *Higgins v. Raymark Industries, Inc.*, No. CV-87-0537 (S.D.N.Y.). Defendants strenuously objected to the consolidation stating that great prejudice would result from combining the two markedly different cases.

Plaintiff Johnson, "essentially a well man"[5] diagnosed in 1985 with a non-impairing lung condition, never personally used asbestos-containing products but claimed "bystander exposure" to such products used by other workers during his three-year employment as an electrician's helper at the Brooklyn Navy Yard from 1942-1945.[6] Plaintiff Higgins, on

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4 See corrected majority opinion at Pet. App. 30a-31a. Although Judge Sifton formerly had responsibility for pretrial matters arising from the entire asbestos docket, he also served as trial judge in certain cases, such as the one at bar. The Honorable Jack B. Weinstein, U.S.D.J., now manages the asbestos docket of the Eastern and Southern districts of New York.

5 That description was provided by plaintiff Johnson's own medical expert, Dr. Steven Markowitz. Joint Appendix in *Johnson v. The Celotex Corp.*, Nos. 89-7484 and 89-7542 (2d Cir. 1990) at page 650. [Hereinafter citations to the Joint Appendix before the Second Circuit will be stated as "Jt. App. _____"].

6 See corrected majority opinion at Pet. App. 31a; 32a-33a; 37a. See also Jt. App. 10; 11; 13; 15; 19; 37; 39; 737.

the other hand, died considerably before trial from a more serious asbestos-related lung condition allegedly attributable to his twenty years of bystander exposure while employed as a "chipper and caulker" at the yard from 1946-66. See corrected majority opinion at Pet. App. 31a; 32a-33a; 37a. Johnson and Higgins did not know each other personally, and never worked at the huge shipbuilding facility at the same time.[7]

Since plaintiffs' actions sought compensatory and punitive damages for defendants' alleged failure to warn[8] of the health risks posed by their asbestos-containing products, defendants were certain that the substantially dissimilar exposure periods would prejudice defendants' interests since the jury would have to ignore plaintiff Higgins' "state of the art" evidence[9] reflecting twenty additional years of scientific advances in evaluating Johnson's claim.[10] (See Points II and III of Reasons for Granting the Writ *infra* for a discussion of state of the art and consolidation issues). Defendants were also convinced that defense of the *Johnson* case would be prejudiced by evidence of Higgins' considerably more serious illness and subsequent death. Jt. App. 1743-1758. Despite defendants' objections, on November 7 Judge Sifton ordered a consoli-

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7 See corrected majority opinion at Pet App. 31a; 37a. See also Jt. App. 13; 64; 99-101.

8 In the case at bar (and most other asbestos personal injury actions sounding in negligence and strict products liability), plaintiffs do not claim that injury resulted from defendants' asbestos-containing products' failure to insulate as expected; rather, plaintiffs maintain that those products were defective due to inadequate warnings regarding health risks allegedly posed by those products.

9 Under the controlling New York law, "state of the art" in products liability cases has been defined as "the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of manufacture." *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 438, n.2, 422 N.Y.S.2d 969 (N.Y. App. Div. 1979) (quoting Uniform Products Liability Law § 106[a]).

10 See, e.g., Jt. App. 1743-1758.

dated trial of the *Higgins* and *Johnson* cases.[11] Judge Sifton also rejected defendants' request that the court certify that order for interlocutory appeal to the Second Circuit. Jt. App. 1763-1764. Although defendants made a number of applications to reduce the prejudicial effect of the consolidation, all were rejected.[12]

Since eight defendants settled and one filed a bankruptcy petition prior to trial, the *Johnson* and *Higgins* cases proceeded to trial against three defendants: Owens-Illinois, Celotex, and Raymark Industries, Inc. [hereinafter "Raymark"]. The jury rendered verdicts in favor of both plaintiffs and awarded Mr. Higgins $1 million in compensatory damages and $3 million in punitive damages which were apportioned equally among the three defendants. The jury awarded Mr. Johnson $350,000.00 in compensatory damages[13] and $2.8 million in punitive damages which were imposed as follows: Celotex $1 million dollars, Owens-Illinois $800,000.00 and Raymark $1 million. Mrs. Johnson recovered a $30,000 compensatory award for loss of consortium. Due to post verdict procedural complications apparently defeating diversity jurisdiction as to defendant Celotex in the *Higgins* case,[14] judg-

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11 Jt. App. 1767-1770. Due to delay in obtaining a jury panel from the Southern District of New York, counsel's opening statements did not begin until November 16, 1988.

12 "The [district court] declined to trifurcate or bifurcate the trial to separate issues of causation and compensatory damages from issues of liability and punitive damages. Appellants' motions to have separate juries consider claims of liability and punitive damages in *Johnson* apart from claims in *Higgins*, were denied." Pet. App. 31a. Defendants also unsuccessfully moved to preclude introduction of any post-1945 state of the art evidence. See n.55 *infra* for a discussion of that application.

13 Pursuant to the controlling New York law, the jury apportioned liability between the settling and non-settling defendants resulting in the following percentage allocations: Celotex 12.5%, Owens Illinois 5.0%, Raymark 12.5%. The remaining 70% of liability was equally allocated among seven settling defendants. See corrected majority opinion at Pet. App. 32a.

14 See majority opinion at Pet. App. 32a.

ment was entered only in favor of plaintiff Johnson. Shortly after entry of judgment in *Johnson*, an involuntary bankruptcy petition stayed all proceedings as to defendant Raymark. Following unsuccessful post trial motions, the remaining defendants, Celotex and Owens-Illinois [hereinafter collectively "the defendants"], filed notices of appeal.

The Second Circuit, speaking through the Honorable Gregory W. Carman, U.S.C.I.T.,[15] rejected all defendants' contentions considered,[16] and affirmed the judgment of district court in its entirety.[17] The Honorable J. Daniel Mahoney, C.J., filed a separate opinion which dissented only from the majority's ruling upholding the awards of punitive damages.[18]

Following review of the Second Circuit's majority and separate opinions, defendants sought rehearing before the panel and *en banc* by timely petition filed April 3, 1990. Pet. App. 78a-94a.

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15 Judge, United States Court of International Trade, sitting by designation.

16 As indicated in the court of appeals' opinions below, defendants raised a number of constitutional challenges to the awards of punitive damages which the court did not reach. As in the proceedings below, petitioner respectfully maintains that the procedural and substantive due process arguments were adequately preserved, and that defendants presented sufficient proofs to demonstrate an unjust result occasioned by multiple imposition of punitive awards with respect to that latter challenge. Moreover, petitioner wishes to preserve its right to argue those issues in the event this Court grants certiorari and deems them adequately preserved.

17 *Johnson v. The Celotex Corp.*, Nos. 89-7484, 89-7542, slip op. (2d Cir. 1990 March 20, 1990) (Carman, U.S.C.I.T., sitting by designation, opinion of the court). Pet. App. 1a-22a. [Hereinafter cited as "original majority opinion"].

18 Judge Mahoney dissented only from "the majority's conclusion that punitive damages are adequately supported by the evidentiary record," and stated that he "would reverse the award of punitive damages as a matter of law." *Johnson v. The Celotex Corp.*, Nos. 89-7484; 89-7542, slip op. (2d Cir. March 20, 1990) (Mahoney, Circuit Judge, concurring in part and dissenting in part). Pet. App. 22a-26a. [Hereinafter cited as "Judge Mahoney's original opinion"].

In their petition for rehearing defendants asserted, *inter alia*, that by its own description the majority misapprehended and misapplied the controlling New York law regarding the type of evidence sufficient to sustain an award of punitive damages. Pet. App. 85a-88a.

By letter dated April 20, 1990 (Pet. App. 27a) the Second Circuit supplied parties to the appeal with a "corrected" majority opinion (Pet. App. 28a-49a) and a "revised" version of Judge Mahoney's concurrence and dissent (Pet. App. 49a-52a).[19] Although the letter did not make any reference to defendants' petition for rehearing, the only "correction" to the majority opinion consisted of excision of crucial language which defendants maintained established the majority's improper use of a negligence, rather than a recklessness, standard in assessing the sufficiency of evidence to support the awards of punitive damages.[20] The correction did not change the facts upon which the Second Circuit based its decision, the essential nature of its legal analysis, nor the result reached. Petitioner respectfully maintains that the Second Circuit's alteration of the majority opinion attempts a cosmetic correction of a seriously erroneous decision.

Several weeks after issuance of the corrected majority opinion, the Second Circuit denied defendants' petition for rehearing by order dated May 24, 1990. That order does not refer to issuance of the corrected opinion, nor does it express any reasons for the denial. Pet. App. 67a.

After denial of the petition for rehearing, Celotex filed a motion with the Second Circuit requesting either a stay or

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19 The corrected majority opinion and Judge Mahoney's revised opinion are reported: *Johnson v. The Celotex Corp.*, 899 F.2d 1281 (2d Cir 1990). Where the wording of the original majority and separate opinions are identical to that of the "corrected" and "revised" versions of those documents, petitioner will hereinafter cite to both. Where language appears in only the original version of either opinion, petitioner will cite that document, and, if relevant, refer the reader to pertinent passage of the corrected and revised opinions.

20 The correction is discussed *infra* under Point I of Reasons for Granting the Writ.

recall of that court's mandate pending the filing of this petition for certiorari, but the motion was denied and mandate issued on June 6, 1990. Pet. App. 68a. Shortly thereafter, Celotex paid the bulk of the judgment[21] and a partial satisfaction was filed early in July. Pet. App. 76a. On August 8, 1990, the district court entered an amended judgment pursuant to ongoing proceedings to specify the exact amounts of principle and interest owed by petitioner and other defendants. Pet App. 73a. Celotex then filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING NEW YORK LAW BY UPHOLDING AN AWARD OF PUNITIVE DAMAGES PREDICATED UPON MERELY NEGLIGENT, RATHER THAN RECKLESS OR INTENTIONAL, CONDUCT

A. Proceedings in the Court of Appeals

Although defendants raised a number of arguments against the imposition of punitive damages in the proceedings below, the Second Circuit reviewed only the question of whether legally sufficient evidence was adduced at trial to permit imposition of punitive damages under the controlling New York law.[22]

In performing that assessment, the majority recounted in part the district court's proper jury instructions that punitive damages require a finding that a defendant's conduct was "wanton and reckless,"[23] but then proceeded to apply an

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21 Celotex has paid $1,215,603.41; only the amount of interest between verdict and judgment remains outstanding.

22 Original and corrected majority opinions at Pet. App. 13a-18a and 40a-45a, respectively; Judge Mahoney's original and revised opinions at 22a-26a and 49a-52a, respectively.

23 Original and corrected majority opinions at Pet. App. 17a and 44a, respectively. The brief district court instruction quoted in the majority opinion used the phrase "wanton and reckless"; the majority opinion itself uses the phrase "wanton or reckless." *Id.*

erroneous ordinary negligence standard to sustain the awards at bar:

> *A review of the evidence shows that the award of punitive damages was supported by the evidence as a matter of law.* Plaintiff produced evidence at trial through expert witnesses, medical reports and documents from which the jury could reasonably conclude that appellants acted in *a wanton or reckless manner.* For example, plaintiff's expert witness testified that a link between asbestos and lung cancer was suspected as early as 1930 and that this link was considered to be probable shortly after 1940. Another expert witness stated in his deposition that by 1942 there were enough cases of the association between lung cancer and asbestos to include this information in a medical textbook on occupational cancer. A former employee of Owens-Illinois testified that workers at a New Jersey plant, including plant executives, wore respirators in the areas of loose raw material including asbestos. The jury was free to conclude from this and other evidence presented that *appellants knew or should have known of the dangers of asbestos* and did not adequately protect or warn users of asbestos, *thereby acting in a wanton or reckless manner.*

Original majority opinion at Pet. App. 17a (emphasis supplied).

In their petition for rehearing before the panel and *en banc*, defendants specifically referred to the last sentence of the above passage in arguing that the majority had incorrectly interpreted and applied New York law in upholding an award of punitive damages based upon negligent[24] rather than reckless conduct.[25]

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24 "Knew or should have known" is clearly a negligence standard. *See generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law or Torts* § 32 at p. 184 (5th ed. 1984).

25 See "Petition for Rehearing and Suggestion of Rehearing En Banc for Defendants-Appellants Owens-Illinois, Inc. and the Celotex Cor-

In dissenting from the majority's punitive damages ruling,[26] Judge Mahoney stated that the majority had departed from both the controlling New York law as well as Judge Friendly's highly respected opinion in *Roginsky v. Richardson-Merrell, Inc.*,[27] the applicable Second Circuit precedent.

> [New York law provides that] [p]unitive damages . . . are not properly chargeable against a defendant who merely 'should have known' of the risk in question. It must be shown that the defendant *was aware of the risk, and that he consciously disregarded it. See Roginsky*, 378 F.2d at 843 (punitive damages proper where manufacturer shown 'to have become aware of the danger and to have done nothing, deliberately closing its eyes'). There has been no such showing here.

Judge Mahoney's original and revised opinion at Pet. App. 24a and 51a, respectively (emphasis supplied).

In addressing the punitive damages issue, Judge Mahoney quoted Dean Prosser's formulation of the stringent common law rule requiring "willful or wanton" conduct involving a conscious and deliberate disregard of other's interests,[28] and

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poration" at Pet. App. 86a ("Defendants respectfully maintain that the majority's analysis is patently erroneous. Indeed the final line of that discussion contradicts itself since negligence is not synonymous with recklessness.").

26 "I respectfully dissent, however, from the majority's conclusion that punitive damages are adequately supported by the evidentiary record, and would reverse the award of punitive damages as a matter of law." Judge Mahoney's original and revised opinions at Pet. App. 22a and 42a, respectively.

27 378 F.2d 832 (2d Cir. 1967) (Friendly, J., opinion of the court).

28 "[P]unitive damages may be deemed appropriate where a defendant, while not intending to injure a plaintiff, exhibits 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.' " Judge Mahoney's original and revised opinions at Pet. App. 23a and 50a, respectively (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 2, at 9 (5th ed. 1984)).

compared it to the more daunting New York standard for imposition of punitive damages. "As we have said, however, in another diversity case where we undertook a thorough review of the applicable New York precedents, New York law contemplates that 'the recklessness that will give rise to punitive damages must be close to criminality, see 14 N.Y. Jur., Damages § 181 p. 41, and . . . , like criminal conduct, it must be "clearly established" ' "[29]

Applying the correct punitive damages standard and "state of the art evidence"[30] to the facts at bar, Judge Mahoney concluded that there was insufficient evidence for submission of punitive damages to the jury and that the punitive awards should be reversed as a matter of law.[31]

As stated above, several weeks after the filing of defendants' petition for rehearing, the Second Circuit issued a "corrected" majority opinion and a "revised" concurrence and dissent. The correction to the majority opinion consisted of the deletion of the phrase "or should have known" from

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29 Judge Mahoney's original and revised opinions at Pet. App. 23a and 50a, respectively (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967)).

Judge Mahoney further noted that *Roginsky* "went on to quote . . . the definition in N.Y. Penal Law § 15.05(3) (McKinney 1987), since unchanged, as setting forth New York's view of recklessness. Section 15.05(3) provides in pertinent part:

> A person acts recklessly with respect to a result . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur . . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

I do not regard the evidence in this case as adequate for submission of punitive damages to the jury under these standards." Judge Mahoney's original and revised opinions at Pet. App. 23a-24a and 50a-51a, respectively.

30 See Point II of Reasons for Granting the Writ *infra* for a discussion of state of the art issues.

31 Judge Mahoney's original and revised opinions at Pet. App. 22a-26a and 49a-52a, respectively.

the sentence in which the majority enunciated and applied the legal standard to the evidence of record: "The jury was free to conclude from this and other evidence presented that appellants knew *or should have known* of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner." Compare original and corrected majority opinions at Pet. App. 17a-18a and 44a, respectively. Aside from deletion of the phrase "or should have known," the original and corrected majority opinions are identical.

Along with the corrected majority opinion the Second Circuit issued a "revised" concurrence and dissent which reflected changes in Judge Mahoney's quotation of and reference to the majority opinion.[32]

Several weeks after issuance of the corrected majority opinion, the Second Circuit issued an order denying defendants' petition requesting rehearing before the panel or *en banc*.

Petitioner respectfully maintains that the correction of the majority opinion effects only a cosmetic change which does not repair the majority's misapprehension or misapplication of the controlling state law, nor the seriously erroneous result reached under that faulty legal analysis.

Petitioner does not question—and would not dispute in this Court—the Second Circuit's ability *vel non* to issue an opinion correcting technical mistakes, nor that court's ability to

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32 The italicized language in the following quote from Judge Mahoney's original opinion was not included in his revised concurrence and dissent: "The majority reasons that the jury could conclude, on this record, 'that appellants knew *or should have known* of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner.' *There are two problems with this rationale. First, as I have already noted, a 'should have known' formulation simply does not equate with recklessness under New York law; actual awareness is required. See Roginsky, 378 F.2d at 843; N.Y. Penal Law § 15.05(3). Second*, the majority paints with much too broad a brush, as I see it, in its reference to the 'dangers of asbestos.' Compare Judge Mahoney's original and revised opinions at Pet. App. 25a and 52a, respectively.

reconsider a case and issue an "amended" opinion changing matters of substance. Petitioner does, however, dispute the court of appeals' ability to avoid its responsibility to follow the controlling law by excising language that provided the clearest—but hardly the only—evidence that the wrong legal standard was applied.

One cannot reasonably explain deletion of the phrase "or should have known" from the sentence expressing the majority's ruling as a mere technical correction to a decision which applied the correct law. The language remaining in the corrected opinion indicates that the majority did not consider what Celotex actually knew[33] regarding the dangers of asbestos at the time of Mr. Johnson's employment, rather, the majority upheld the award of punitive damages based upon what others suspected or thought probable:

> A review of the evidence shows that the award of punitive damages was supported by the evidence as a matter of law. Plaintiff produced evidence at trial through expert witnesses, medical reports and documents from which the jury could reasonably conclude that appellants acted in a wanton or reckless manner. *For example, plaintiff's expert witness testified that a link between asbestos and lung cancer was suspected as early as 1930 and that this link was considered to be probable* shortly after 1940. Another expert witness stated in his deposition that by 1942 there were enough cases of *the association* between lung cancer and asbestos *to include this information in a medical textbook* on occupational cancer. A former employee of Owens-Illinois testified that workers at a New Jersey plant, including plant executives, wore respirators in the areas of loose raw material including asbestos. The jury was free to conclude from

33 As Judge Mahoney points out in both his original and revised opinions: "[Under New York law] [p]unitive damages . . . are not properly chargeable against a defendant who merely 'should have known' of the risk in question. It must be shown that defendant was aware of the risk, and that he consciously disregarded it. *See Roginsky*, 378 F.2d at 843." Pet. App. 24a; 51a.

> this and other evidence presented that appellants knew [or should have known] of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner.

Original majority opinion at Pet. App. 17a. [Text in brackets omitted from corrected majority opinion. See Pet. App. 44a].

It is also highly significant that none of the punitive damages evidence discussed in the above passage properly pertains to plaintiff Johnson's punitive claim against Celotex. The majority did not consider what Celotex actually knew from 1942-45 about risks to "bystanders" like Johnson exposed to finished asbestos products. Rather, the majority, erroneously applying a negligence standard, focused on what Celotex "should have known" based upon what others knew, "suspected," or "considered to be probable." Moreover, even if one advanced the untenable argument that the majority meant to say that it inferred Celotex's actual knowledge of those risks based upon what others knew,"[34] such actual knowledge could not support the award of punitive damages at bar since those risks do not relate to plaintiff Johnson.

The punitive damages proofs mentioned in the majority opinion pertain to workers in "asbestos processing plants" who had "direct and sustained exposure to high concentration levels of asbestos fibers,"[35] not to "bystanders" like Johnson who was exposed to lower concentration levels since he: 1) did not personally use raw asbestos fiber (or even finished asbestos products), 2) worked in a shipyard rather than an asbestos processing plant, and 3) derived his "bystander" exposure from "finished hardbound insulation products containing asbestos" used by other shipyard workers.[36] As Judge

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34 It is highly unlikely that a court which corrects its original opinion—apparently in response to a petition for rehearing—would fail to express itself accurately in its second opinion.

35 Judge Mahoney's original and revised opinions at 24a-25a and 51a-52a, respectively.

36 See Judge Mahoney's original and revised opinions at Pet. App. 24a (the last two lines) to 25a, and 52a (the last two lines) to 53a, respectively.

Mahoney stated in his dissent, the record at bar contains "*no* evidence" to support plaintiff Johnson's punitive award against Celotex. Pet. App. 25a; 52a (emphasis in original).

B. The Court of Appeals' Adjudication Of The Punitive Damages Issue In The Case At Bar Calls For An Exercise Of This Court's Power Of Supervision

While it is true that a case involving an erroneous result predicated upon a court of appeals' misapprehension and misapplication of state law is not the most likely candidate for a grant of certiorari, petitioner Celotex respectfully maintains that the punitive damages issue in the case at bar warrants issuance of the writ, even if not plenary consideration.[37]

First, the Second Circuit's decision on the punitive damages issue was seriously and undoubtedly erroneous. That alone warrants this Court's corrective action short of plenary consideration. Furthermore, the Second Circuit's manner of adjudication presents a compelling case for this Court's exercise of its supervisory powers. Although accorded the opportunity to correct its erroneous decision through rehearing or rehearing *en banc*, the Second Circuit refused to do so in a straightforward manner but instead attempted a cosmetic correction which deflected Celotex's challenge and preserved the majority's flawed reasoning and unjust result. The practice employed in the case at bar evinced a cavalier attitude towards a federal court's basic obligation to respect and follow controlling state law in diversity cases. Moreover, careful observance of state laws limiting the availability of punitive damages is of particular importance given the threat such

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37 Given the unequivocal nature of the Second Circuit's error with respect to the punitive damages and state of the art issues, Celotex respectfully suggests that reversal of the punitive award as a matter of law, or a "grant, vacate and remand" order may be appropriate in the case at bar. See "Conclusion" to this petition *infra*.

damages pose to litigants' due process rights. *See, e.g., Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*.[38]

The fact that the case at bar arises from a circuit which severely restricts rehearings *en banc*[39] also argues for grant of certiorari. A court of appeals which does not meet its obligation to grant *en banc* review of a panel decision which is both obviously erroneous and inconsistent with the controlling circuit precedent,[40] forces this Court to exercise its supervisory powers or allow an injustice to occur.

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38 109 S. Ct. 2909, 2921 (1989) (Blackmun, J., opinion of the Court) (reserving for "another day" consideration of due process challenges to punitive damages). See Justice Brennan's concurring opinion, *id.* at 2923-24 (regarding availability of due process challenge). See also Justice O'Connor's opinion concurring in part and dissenting in part. *Id.* at 2924 ("[N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (opinion concurring in part) regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.")

39 In his law review article on the subject, Second Circuit Judge Jon O. Newman states: "One of the distinctive characteristics of the United States Court of Appeals for the Second Circuit is the infrequency of rehearings in banc. In the three court years ending June 30, 1983, the Second Circuit reheard only 2 cases in banc," the lowest number granted by a court of appeals during that period. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brooklyn L. Rev. 365-66 (1984) [citations omitted]. "In the same period in bancs in all circuits averaged 18, reaching a high of 44 in the Fifth Circuit." *Id.* at 365.

40 See discussion of Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) at pages 10-13 of this petition.

II.

THE SECOND CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING NEW YORK LAW BY EVALUATING DEFENDANT'S KNOWLEDGE OF THE RISKS POSED BY ITS PRODUCTS ON THE BASIS OF "STATE OF THE ART" EVIDENCE DEVELOPED AFTER DEFENDANT'S MANUFACTURE OF, AND PLAINTIFF'S LAST EXPOSURE TO, THOSE PRODUCTS

The Second Circuit's majority opinion not only misapprehended the New York punitive damages standard, it also misapprehended and misapplied applicable "state of the art" legal principles which preclude imposition of punitive damages in the case at bar.

Under the controlling New York law, the relevant "state of the art" in products liability cases has been defined as "the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of manufacture."[41] Under this standard the jury in the case at bar should have evaluated plaintiff Johnson's claim only with respect to evidence of knowledge of asbestos risks extant and reasonably available to asbestos-product manufacturers at or before 1945—the date of his last exposure to those products. Instead, however, due to the district court's consolidation of the *Johnson* and *Higgins* cases and denial of defendants' motions to ameliorate the prejudicial effect of that consolidation, the jury heard and applied plaintiff Higgins' 1946-66 state of the art evidence to Johnson's claim.[42]

In upholding Mr. Johnson's award of punitive damages the Second Circuit's majority opinion made an error all too com-

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41 *Bolm v. Triumph Corp.*, 422 71 A.D.2d 429, 438, n.2, 422 N.Y.S.2d 969, 975, n.2 (N.Y. App. Div. 1979) (quoting Uniform Products Liability Law, § 106[a]).

42 See Point III *infra* regarding the district court's consolidation of the *Johnson* and *Higgins* cases and the inadequacy of the trial court's instructions to the jury to consider each plaintiff's claims individually.

mon in "failure to warn" toxic tort actions. The majority erroneously assumed that once an asbestos-product manufacturer had knowledge that asbestos could cause a particular ailment (e.g., asbestosis) under a particular set of exposure circumstances (e.g., the use of raw asbestos fiber by factory workers manufacturing insulation products)[43] it also necessarily had knowledge of all other "dangers of asbestos." See Judge Mahoney's original and revised opinions at Pet. App. 25a and 52a, respectively.

As Judge Mahoney points out, plaintiff Johnson's punitive damages evidence regarding the corporate defendants' knowledge of the dangers of asbestos consisted of references to medical literature and corporate communications indicating that as of the mid 1940s there was information that workers in asbestos-processing plants who experienced "direct and sustained exposure to high concentration levels of asbestos fibers" could be harmed thereby. Judge Mahoney's original and revised opinions at Pet. App. 24a-25a and 51a-52a, respectively. The record, however, "contains *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s [the time of plaintiff Johnson's last exposure to asbestos] information establishing, or even predicting, that 'bystanders' [like Johnson who did not personally use raw fiber or even finished asbestos products] might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use. The award of punitive damages is, therefore, in my view unsustainable." *Id.* at Pet. App. 25a and 52a, respectively. This is so because under New York law punitive damages "are not properly chargeable against a defendant who merely 'should have known' of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it." *Id.* at Pet. App. 24a and 51a, respectively.

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43 Such manufacturing workers were generally exposed to much higher concentration levels of airborne asbestos fibers than, for example, insulators who worked with finished asbestos-containing products, or "bystanders" like plaintiff Johnson who claimed exposure to asbestos-containing products used by other workers.

Since there was no evidence below that the asbestos-product manufacturers at bar had actual knowledge in the mid 1940s that plaintiff Johnson's "bystander" exposure to finished asbestos-containing products could result in the ailment he developed, "asbestosis-related pleural disease,"[44] his award of punitive damages is improper under New York law and should be corrected by this Court.[45]

III.

THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S CONSOLIDATION FOR TRIAL OF TWO MARKEDLY DISSIMILAR FAILURE TO WARN PRODUCT LIABILITY ACTIONS INVOLVING, INTER ALIA, ENTIRELY DIFFERENT PERIODS OF EXPOSURE TO THE PRODUCT AND SIGNIFICANTLY DIFFERENT STATE OF THE ART PROOFS

The Second Circuit's affirmance of the district court's consolidation for trial of two[46] "failure to warn" products liability actions involving, *inter alia*, entirely different periods of product exposure and markedly different "state of the art" proofs deprived petitioner of a fair trial and constitutes an impermissible practice under Federal Rule of Civil Procedure 42 requiring an exercise of this Court's supervisory powers.

Rule 42(a) of the Federal Rules of Civil Procedure[47] permits the complete or partial consolidation of pretrial or trial

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44 Plaintiffs' expert medical witness apparently was unwilling to characterize Mr. Johnson's condition as the more serious disease "asbestosis," but did not think it sufficiently mild to classify as "pleural disease," so he chose a middle ground by using the term which appears in the text above. See Jt. App. 715.

45 See Point IB of Reasons for Granting the Writ *supra*.

46 Petitioner is aware that courts have on occasions consolidated significantly greater numbers of asbestos actions for trial, and that some of those trials have resulted in defense verdicts. That alone, however, does not prove that consolidation of the markedly different *Johnson* and *Higgins* actions was proper, nor does it justify the obviously unfair judgment at bar.

47 Reprinted at Pet. App. 70a.

proceedings involving common questions of law or fact. In so providing the rule grants district courts broad discretion to manage their dockets and promote judicial economy.[48]

In making consolidation rulings, a court should weigh the potential time and cost savings to the parties, witnesses and the court against the risks of prejudice, confusion, inconvenience and expense that may result from consolidation.[49] Analysis of factors governing consolidation decisions is more likely to indicate consolidation of pretrial rather than trial proceedings since the dangers of confusion, expense and prejudice are more likely to occur with respect to the latter.[50]

Despite the latitude accorded trial judges with respect to consolidation, their discretion is not totally unfettered and is subject to appellate review under the abuse of discretion standard.[51] Where prejudice to the rights of either party results from an order of consolidation, such a ruling constitutes reversible error.[52]

Petitioner respectfully maintains that the consolidation ruling in the case at bar deprived Celotex of a fair trial and resulted in a verdict which is demonstrably the result of prejudice and confusion.

As mentioned above, the district court, over defendants' objections, consolidated the *Johnson* and *Higgins* actions for trial several days before their separate trials were to commence. Defendants objected to the consolidation because

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48 D. Herr, R. Haydock & J. Stempel, *Motion Practice* 291-95 (1st ed. 1985). [Hereinafter Herr, *Motion Practice*].

49 Herr, *Motion Practice* 291-295; 9 C. Wright & A. Miller, Federal Practice and Procedure §§ 2382-2383 (1971 & Supp. 1990).

50 Herr, *Motion Practice* 292-95. This is true since trial consolidation should be ordered only where actions can be tried before the same jury with overlapping and largely congruent liability proofs. *Id.* at 292-93; 295.

51 Herr, *Motion Practice* at 295.

52 *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967).

although the two actions were superficially similar in several respects, they were fundamentally different in ways which precluded a fair consolidated trial.

Although Johnson and Higgins both worked at the Brooklyn Navy Yard, a huge facility,[53] they did not do so during the same period. That difference, as well as the vastly different duration of their respective employments proved an insurmountable obstacle to a fair consolidated trial of two "failure to warn" product liability actions where "state of the art" evidence is crucial. Johnson worked at the yard as an electrician's helper during the three year period from 1942 to 1945; Higgins worked as a "chipper and caulker" for the 20 year period from 1946 to 1966. Since Johnson was not exposed to asbestos-containing products after leaving the yard,[54] the jury deciding his claim should not have heard or considered post-1945 "state of the art" evidence. Or, to put it in other terms, the jury should have heard and considered evidence of only those asbestos risks known to the scientific and industrial community prior to 1945. But, unfortunately, due to the consolidation and denial of defendants' motion to preclude introduction of any post-1945 evidence,[55] the jury was permitted to hear evidence pertaining to the advances in medical, scientific and industrial knowledge achieved during

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53 Mr. Johnson described the Brooklyn Navy Yard as having approximately 100,000 employees, and covering an area about three miles long and one-half mile wide. See Jt. App. 10; 377-378. See also Jt. App. 383. See original and corrected majority opinions at Pet. App. 6a and 33a, respectively.

54 See original and corrected majority opinions at Pet. App. 6a and 33a, respectively.

55 The majority opinion incorrectly states that defendants moved "to preclude all evidence of knowledge post-1945 in relation to plaintiff Johnson . . . ." Original and corrected majority opinions at Pet. App. 4a and 31a, respectively. Defendants actually moved to completely preclude introduction of such evidence. Joint Appendix at Jt. App. 1783; 1784, line 19. At trial and in their appeal to the Second Circuit, defendants maintained that the introduction of plaintiff Higgins' post-1945 state of the art evidence was prejudicial to defense of the *Johnson* claim.

the subsequent 20 year period when Mr. Higgins was employed. It was only during this latter period that the "state of the art" began to include information that "bystander" asbestos exposure like that experienced by plaintiff Johnson could cause his type of pulmonary injury.[56]

Petitioner maintains that the failure of the jury to consider Mr. Johnson's and Mr. Higgins' claims separately despite the trial court's instructions[57] is demonstrated by the fact that the jury found a similar duty to warn as to both plaintiffs,[58] and, more significantly, awarded the plaintiffs almost identical punitive damages: $3 million for Higgins and $2.8 million for

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56 As Judge Mahoney noted in his dissent: "This record contains *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that 'bystanders' might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use." Judge Mahoney's original and revised opinions at Pet. App. 25a and 52a, respectively.

57 See original and corrected majority opinions at Pet. App. 10a and 37a, respectively ("Instructions were given throughout the trial and in the charge to caution the jury to consider each plaintiff's claims individually. Two separate verdict forms were provided to the jury, one for *Johnson*, the other form for *Higgins*").

58 In holding defendants liable to both plaintiffs, the jury necessarily found a duty to warn existed during both Mr. Johnson's and Mr. Higgins' periods of employment. Under the controlling New York law, a defendant's duty to warn exists, if at all, only with respect to risks reasonably knowable at the time of defendant's manufacture of the product. *See, e.g., Bolm v. Triumph Corp.*, 71 A.D.2d 429, 438, n.2 and preceding text, 422 N.Y.S.2d 969 (N.Y. App. Div. 1979). Yet, as Judge Mahoney noted, there was no evidence in the mid 1940s that the state of the art for asbestos included information that "bystanders" in shipyards were at risk. See Judge Mahoney's original and revised opinions at Pet. App. 25a and 52a, respectively.

While he would reverse the award of punitive damages as a matter of law, Judge Mahoney upheld the compensatory award on the theory that during the time of Johnson's exposure, "appellants were aware that the properties of asbestos were such that it could, at some level of exposure, injure a human being." Judge Mahoney's original and revised opinions at Pet. App. 24a and 51a, respectively. Petitioner respectfully maintains that such generalized information is insufficient to support even an award of compensatory damages.

Johnson. Since Mr. Higgins' punitive claim was predicated upon 20 additional years of defendants' purported inaction in the face of a duty to warn, it is impossible to believe that the jury did not apply Higgins' proofs to Johnson's claim.

While the consolidation was most obviously prejudicial with respect to the state of the art evidence, prejudice also appears in the fact that the jury compensating Johnson, "essentially a well man,"[59] also heard—and was improperly swayed by—evidence of Higgins' slow death from serious lung disease in graphic detail through the testimony of his widow and son.[60]

Even if the case at bar did not arise from the large and recently acquired asbestos docket of district courts in need of guidance with respect to consolidation issues, it would still warrant this Court's grant of certiorari to correct the serious injustice visited upon petitioner Celotex. The fact that it does arise from such a docket, however, presents a stronger case for this Court's exercise of its discretion.

While recognizing that this Court cannot be asked to articulate a comprehensive set of trial consolidation guidelines for all types of cases heard in the federal courts, petitioner respectfully suggests that guidance from this Court counseling consolidation of only those failure to warn product liability actions with largely congruent liability or state of the art evidence would help eliminate jury confusion and prejudice to

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59 Mr. Johnson was so described by his own medical expert. Jt. App. 650.

A recent empirical study supports the proposition that consolidating a severely injured plaintiff's trial with that of a plaintiff less severely injured tends to result in overcompensation of the latter, and undercompensation of the former. Bordens & Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, Judicature (June-July, 1989) at 23.

60 They related his difficulties in breathing; how he brought a portable oxygen unit to church with him (Jt. App. 95); how he could not sleep normally and was compelled to sit upright through the night dependent upon a nearby oxygen unit (Jt. App. 71-72); how his lips and fingernails turned purple, and his feet swelled (Jt. App. 98); and how he finally suffocated to death (Jt. App. 99-101).

defendants in thousands of cases. Indeed, the fact that the district court and the Second Circuit had to resort to and purported to utilize a rather general (and non-hierarchical) eight-factor trial consolidation test contained in an unreported Maryland district court opinion[61] strongly suggests the need for guidance from this Court. Even a ruling from this Court which serves to encourage the lower courts to develop more meaningful consolidation standards than those employed in the case at bar would be beneficial.

Even if this Court does not find the instant case an appropriate vehicle for enunciation of consolidation standards for asbestos or toxic tort dockets, an exercise of this Court's supervisory powers is necessary to instruct lower courts—especially those dealing with crowded dockets—that Rule 42(a) does not provide license to consolidate markedly dissimilar actions. Indeed, district courts such as the Eastern and Southern Districts of New York with hundreds or thousands of pending asbestos cases to choose from have absolutely no need to prejudice defense of those cases by combining moderately—much less markedly—dissimilar actions in order to achieve judicial economy.[62]

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61 Although the Second Circuit repeated and purported to utilize an eight-factor trial consolidation test set forth in an unreported Maryland district court opinion, it upheld the consolidation of *Johnson* and *Higgins* despite the fact that the two actions differed as to three of the most crucial elements of that test: (3) period of exposure, (4) type of disease and (5) whether plaintiffs were living or deceased. Petitioner respectfully maintains that the district court below gave undue weight to the criterion least important from the standpoint of avoiding decision on an improper basis: (6) both *Johnson* and *Higgins* were ready for trial at the same time. See Statement of the Case *supra* regarding consolidation of *Johnson* and *Higgins* several days before their separate trials were to begin.

62 Given the great number of pending Brooklyn Navy Yard asbestos personal injury actions, the district court, perhaps with the assistance of counsel, surely could have found another case with an exposure period similar, if not identical, to that of plaintiff Johnson.

CONCLUSION

For all the foregoing reasons, the petition should be granted and the case given plenary review. In the event this Court decides plenary review is unnecessary, petitioner respectfully urges the Court to grant certiorari, vacate the judgment below and remand the case to the district court for a new trial on the ground that the consolidated trial was improper. If the Court declines to grant a new trial, petitioner respectfully requests that the Court enter judgment in favor of Celotex as a matter of law with respect to plaintiff's punitive damages claims, or remand the case to the Second Circuit for reconsideration of the punitive damages, state of the art and consolidation issues.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	PAGE
Opinion of the United States Court of Appeals for the Second Circuit, Dated March 20, 1990	1a
Letter Dated April 20, 1990 Amending Opinion of the United States Court of Appeals for the Second Circuit, Dated March 20, 1990	27a
Corrected Opinion of the United States Court of Appeals for the Second Circuit, Dated March 20, 1990	28a
Memorandum and Order of the United States District Court (Joint Eastern and Southern Districts Asbestos Litigation), Dated February 3, 1989	53a
Order of the United States Court of Appeals for the Second Circuit on Rehearing, Dated May 24, 1990	67a
Judgment of the United States Court of Appeals for the Second Circuit, Dated March 20, 1990	68a
Fed. R. of Civil Procedure 42	70a
Judgment of the United States District Court for the Southern District of New York, Dated February 10, 1989	71a
Amended Judgment of the United States District Court for the Southern District of New York, Dated August 8, 1990	73a

PAGE

Partial Satisfaction of Judgment, Dated July 6, 1990 . 76a

Petition For Rehearing And Suggestion Of Rehearing En Banc, Filed in the United States Court Of Appeals For The Second Circuit, Dated April 3, 1990 ..... 78a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 342—August Term, 1989

(Argued: November 2, 1989 Decided: March 20, 1990)

Docket Nos. 89-7484, 89-7542

JOHN E. JOHNSON and h/w ANN MARIE JOHNSON,

Plaintiffs-Appellees,

—against—

THE CELOTEX CORPORATION, OWENS-ILLINOIS, INC.,

Defendants-Appellants.

Before:

MINER and MAHONEY, *Circuit Judges,*
and CARMAN, *Judge.**

Defendant-appellant The Celotex Corporation appeals from a judgment entered after a jury verdict and from orders of the United States District Court for the South-

* Honorable Gregory W. Carman, Judge, United States Court of International Trade, sitting by designation.

ern District of New York regarding Joint Eastern and Southern Districts Asbestos Litigation, (Sifton, J.), denying its motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial and for a mistrial. Defendant-appellant Owens-Illinois, Inc. appeals from the same judgment and from orders denying its motion for judgment notwithstanding the verdict and its motion for a new trial or, in the alternative, for a remittitur.

Affirmed. Judge Mahoney concurs in part and dissents in part in a separate opinion.

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CARMAN, *Judge*:

Defendant-appellant The Celotex Corporation (Celotex or appellant) appeals from a judgment entered in the Southern District of New York after a jury trial before Charles P. Sifton, J., regarding Joint Eastern and Southern Districts Asbestos Litigation, awarding compensatory and punitive damages and damages for loss of consortium in an asbestos products liability personal injury case. Celotex appeals from orders denying its motion for judgment notwithstanding the verdict, or in the alternative, a new trial and for a mistrial. Defendant-appellant, Owens-Illinois, Inc. (Owens-Illinois or appellant) appeals from the same judgment and orders denying its motion for judgment notwithstanding the verdict and its motion for a new trial or, in the alternative, for a remittitur.

Appellants request us to reverse the judgment below or, in the alternative, vacate the judgment and remand for a new trial. In the alternative, appellants ask us to vacate the punitive damages award and remand for a new trial on the issue of punitive damages.

BACKGROUND

This appeal is one of many which arises from thousands of cases filed against manufacturers and producers of asbestos, resulting in unparalleled litigation in American tort law. *See Racich v. Celotex Corp.*, 887 F.2d 393, 394 (2d Cir. 1989); *In re School Asbestos Litigation*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The cases have been filed pursuant to New York's one-year revival statute for certain toxic torts,

including alleged asbestos related torts, 1986 N.Y. Laws, ch. 682, § 4. To manage the litigation, all of the cases in the Southern and Eastern Districts were assigned for pre-trial purposes to Judge Sifton. *Racich*, 887 F.2d at 395.

At a pretrial conference on November 4, 1988, the court proposed that another asbestos tort case, *Higgins v. Raymark Industries, Inc.*, CV-87-0537 (S.D.N.Y.), be consolidated with *Johnson* which was scheduled for trial on November 7, 1988. The trial court ordered on November 7, 1988 that *Higgins* and *Johnson* be consolidated for trial. Plaintiff Higgins, a chipper and caulker, whose work included chipping off welded sections to prepare for repair work of others, was alleged to have died because of exposure to asbestos while at the Brooklyn Navy Yard from approximately 1946 to 1966. Appellee-plaintiff, John Johnson (plaintiff), an electrician's helper, alleged that he had contracted lung disease while working at the Brooklyn Navy Yard from 1942 to 1945 by inhaling asbestos fibers during this employment.

In *Johnson* and *Higgins* compensatory and punitive damages were sought for claims sounding in negligence and strict liability for defendants' failure to warn of the health risks of their asbestos-containing products.

The Court declined to trifurcate or bifurcate the trial to separate issues of causation and compensatory damages from issues of liability and punitive damages. Appellants' motions to have separate juries consider claims of liability and punitive damages in *Johnson*, apart from claims in *Higgins*, were denied. Appellants' motion to preclude all evidence of knowledge post-1945 in relation to plaintiff Johnson was denied. Eight defendants settled and one filed a petition in bankruptcy prior

to trial. The *Higgins* and *Johnson* cases proceeded to trial against defendants Celotex, Owens-Illinois and Raymark Industries, Inc. (Raymark). The jury rendered a verdict for the plaintiffs in both cases. In *Higgins*, plaintiff was awarded $1 million in compensatory damages and $3 million in punitive damages, divided equally among Celotex, Raymark and Owens-Illinois. In *Johnson* compensatory damages were $350,000 (Celotex 12.5%, Raymark 12.5%, Owens-Illinois 5.0%, seven settling co-defendants 10% each), and punitive damages were assessed as follows: Celotex $1 million, Raymark $1 million and Owens-Illinois $800,000. Plaintiff Ann Marie Johnson was awarded $30,000 for loss of services.

After the verdict, but before entry of judgment, it was discovered that Celotex had never been named or served as a defendant in the *Higgins* case. Further, since Florida was the principal place of business of Celotex and the residence of plaintiff in *Higgins*, the trial court determined there was lack of diversity as to Celotex.

In response to post-trial motions the Court ordered an amendment to the pleadings to add Celotex as a party-defendant pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. The Court then dismissed the complaint in the *Higgins* case as to Celotex for lack of jurisdiction and retained its diversity jurisdiction over defendants Raymark and Owens-Illinois. A subsequent bankruptcy proceeding has stayed this case with regard to Raymark.

FACTS

Plaintiff John Johnson, an employee of the United States Navy, worked as an electrician's helper at the

Brooklyn Navy Yard from 1942 to 1945. The Brooklyn Navy Yard covered an area of about three miles and in the entire yard there were approximately 20 ships under construction or repair. He installed electrical wiring in new and older ships. Although Johnson did not work with any product that he knew contained asbestos, he worked in the vicinity of other tradespeople who installed asbestos insulation material on ships. Johnson could not identify by name any workers in his vicinity or the trade name or manufacturer of any asbestos materials used at the shipyard. Johnson recalled working on destroyers, battleships and in particular remembered working on the *Iowa*, the *Missouri* and the *Franklin* at the yard. He testified that his work area was always dusty and that he would brush off a very fine snow-like dust that accumulated on his clothes.

Product identification testimony was based upon the testimony of other workers employed at the Navy Yard at approximately the same time as Johnson. The co-workers identified over a dozen makers of asbestos-containing products used at the Navy Yard at different times.

In 1945, Johnson left the Navy Yard and was not later exposed to any other asbestos containing products. In 1985, after retirement, Johnson was diagnosed with a lung condition which was attributed to asbestos exposure.

CONTENTIONS OF THE PARTIES

Appellants contend the trial court abused its discretion in consolidating the *Johnson* and *Higgins* cases. They further urge the connection with plaintiff's injury

and appellants' products was insufficient as a matter of law. As to the issue of punitive damages, appellants maintain the Fourteenth Amendment bars an award of punitive damages because appellants have been subjected to repeated punitive damages for the same course of conduct. They also claim procedural due process violations and contend that the punitive damages were not supported by the evidence as a matter of law. Lastly, appellants claim the improper conduct of the trial court together with inflammatory conduct by counsel for plaintiff and improper rulings allowed the jury to hear evidence that should not have been heard, all resulting in a verdict which was the result of pressure and prejudice and which should be revised.

Appellants seek reversal of the judgment, or in the alternative, request that the judgment be vacated and the case be remanded for a new trial as to all issues. Celotex requests that in the alternative, the punitive damage award should be vacated and the case remanded on the issue of punitive damages. Plaintiff seeks affirmance of the judgment below.

DISCUSSION

Consolidation

Rule 42(a) of the Federal Rules of Civil Procedure empowers a trial judge to consolidate actions for trial when there are common questions of law or fact to avoid unnecessary costs or delay. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3d Cir. 1964), *cert. denied*, 382 U.S. 812 (1965); *Zervos v. S.S. Sam Houston*, 427 F. Supp. 500 (S.D.N.Y. 1976), *aff'd*, 636 F.2d 1202 (2d Cir. 1980).

Consolidation of tort actions sharing common questions of law and fact is commonplace. *See, e.g., Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969). This is true of asbestos-related personal injury cases as well. *See, e.g., Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985); *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250 (S.D. Tex. 1985).

The trial court has broad discretion to determine whether consolidation is appropriate. *See, e.g., Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491 (N.D. Ill. 1983); *Stemler v. Burke*, 344 F.2d 393 (6th Cir. 1965). In the exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation. *See, e.g., Romacho v. Stanley*, 567 F. Supp. 1417, 1419 n.2 (S.D.N.Y. 1983), *aff'd sub nom. Morse v. Stanley*, 732 F.2d 1139 (2d Cir. 1984). However, the discretion to consolidate is not unfettered. *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984). Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). When exercising its discretion, the court must consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and availa-

> ble judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Hendrix, 776 F.2d at 1495 (quoting *Arnold*, 681 F.2d at 193). When considering consolidation, a court should also note that the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff. *Id.*

In the instant case, the court properly exercised its discretion in consolidating these two cases for trial. Courts in the Southern and Eastern Districts of New York have used the criteria outlined in an unreported Maryland district court case, *In re All Asbestos Cases Pending in the United States District Court for the District of Maryland*, slip op. (D. Md. Dec. 16, 1983) (en banc), (hereinafter *In re Maryland Asbestos Cases*) as a guideline in determining whether to consolidate asbestos exposure cases. *See, e.g., In re Joint Eastern and Southern Districts Asbestos Litigation*, 125 F.R.D. 60, 64 (E.D.N.Y./S.D.N.Y. 1989); *In re Joint Eastern and Southern Districts Asbestos Litigation*, slip op. at 7 (E.D.N.Y./S.D.N.Y. Jan. 16, 1990). In *In re Maryland Asbestos Cases*, the criteria included: "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged . . . ." *In re Maryland Asbestos Cases* at 3. *Johnson* and *Higgins* had the following characteristics: (1) common worksite;

(2) similar occupation to the extent that both workers were exposed to asbestos in a bystander capacity (they worked in trades that did not involve direct handling of asbestos products); (3) Johnson's period of exposure was from 1942 to 1945 while Higgins' exposure was from approximately 1946 to 1966; (4) Johnson contended that he suffered from asbestosis and asbestosis-related pleural disease while it was alleged that Higgins died as a result of asbestosis and lung disease; (5) Johnson was living and Higgins was deceased; (6) *Johnson* and *Higgins* were both ready for trial; and (7) all plaintiffs were represented by the same counsel. Instructions were given throughout the trial and in the charge to caution the jury to consider each plaintiff's claims individually. Two separate verdict forms were provided to the jury, one for *Johnson*, the other for *Higgins*.

An appellate court will not disturb a trial court's decision to consolidate unless a clear abuse of discretion is shown. *Hendrix*, 776 F.2d at 1495. In the instant case, the trial court was well within its discretion to consolidate the two cases and the court acted throughout in a manner which ensured that each plaintiff's claim was considered separately.

Connection Between Plaintiff's Injury and Appellants' Product

In order to succeed on his claim, plaintiff had the burden of proving to the jury that he was exposed to appellants' merchandise and that it is more likely than not that this exposure was a substantial factor in his injury. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980). Plaintiff had to establish that his injury was proximately

caused by appellants' asbestos and produce evidence identifying each appellant's product as being a factor in his injury. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, *cert. denied*, 110 S. Ct. 350 (1989). Plaintiff admits to presenting to the jury "an unusually detailed circumstantial case." Plaintiff contends that by the "cumulative and uncontradicted nature" of the case, the jury was able to conclude not only that there was exposure, but was compelled to come to that result.

Plaintiff worked at the Navy Yard from 1942 to 1945 as an electrician's helper on board ships including the *Missouri*, the *Iowa* and the *Franklin*. Testimony was provided by eleven men who worked at the Navy Yard in various capacities, some during the same time period as Johnson, some before and after plaintiff's employment. Witness James Shannon worked at the Navy Yard from 1940 to 1965 as a plumber's helper and a welder. Shannon recalled working on the *Iowa* at some time between 1940 and 1944 and identified Philip Carey (Celotex) products, including fifty-pound bags of asbestos cement with the words "Philip Carey" written on them, and Owens-Illinois products, including asbestos pipe covering and the brown boxes containing this material both bearing the name "Owens-Illinois," as being in use during that time period on board the *Iowa*. Shannon's testimony indicated that the only two ships he worked on during the time period 1940-1944 were the *North Carolina* and the *Iowa*. He remembered working first on the *North Carolina*, for at least one year and possibly two, before working on the *Iowa*. From his testimony, the jury could infer that he worked on the *Iowa* during the latter part of this time frame which would

place Shannon and Johnson on the *Iowa* at the same time.

Several of the witnesses testified as to the close interaction of the different crews working together. Moe Rapchik, a sheet metal worker from 1941 to 1945 who worked on board the *Iowa* in 1942, stated that in the course of his employment he worked with "almost every different crew that the Navy Yard had to offer which was electricians, machinists, shipfitters, pipefitters and asbestos installers." Joint Appendix at 322. Although Rapchik could not recall the specific company names of the products used on board the *Iowa*, he identified Owens-Illinois' Kaylo pipe covering and Celotex's Philip Carey asbestos cement as being in use during the time period 1941 to 1945 and stated that the products installed on the *Iowa* were the same types of products that were installed on every other ship he worked on. Rapchik described the asbestos fibers in general as being "[a]ll over the deck . . . . We crushed them with our feet as we walked . . . and that is how we got it all over our clothes and when we got home at night, we were white all over." Joint Appendix at 329. These descriptions conform to plaintiff's own testimony of working in close, dusty surroundings with other crew members.

Appellants contend that there was insufficient evidence to establish proximate cause and that therefore the case should not have gone to the jury. As an appellate court, we are " 'bound to view the evidence in the light most favorable to [the plaintiff] and to give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.' " *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.) (quoting

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962)), *cert. denied*, 429 U.S. 885 (1976). As the Sixth Circuit noted in *Pratt v. National Distillers & Chemical Corp.*, "We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did." 853 F.2d 1329, 1337 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989). Reviewing the evidence in the light most favorable to the plaintiff, we find that proximate cause existed and that the jury's verdict must be upheld.

Punitive Damages

Appellants contend that the Fourteenth Amendment bars the award of punitive damages in this case because subjecting the appellants to repeated punitive damages violates their substantive due process rights. Appellants further maintain that their procedural due process rights were violated by the way in which the punitive damages claim was tried in this case. They also claim that the award of punitive damages was not supported by the evidence as a matter of law.

Appellants argue that the multiple imposition of punitive damages against them for the same course of conduct offends the fundamental fairness inherent in due process. They cite *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909, 2921 (1989), where the Supreme Court explicitly refused to consider "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" because this question was

not before the court. While refraining from addressing this issue directly, the opinions made clear that this question was a substantial one. *Id.* at 2921 n.23. See also the opinions by Justice Brennan (joined by Justice Marshall), *id.* at 2923-24, and Justice O'Connor (joined by Justice Stevens), *id.* at 2924.

This Court recently reviewed the issue of punitive damages in an asbestos-related personal injury action in *Racich v. Celotex Corp.*, 887 F.2d 393. In *Racich*, appellant Celotex contended, *inter alia*, that the plaintiff's claim for punitive damages was not permitted under New York's one-year revival statute, 1986 N.Y. Laws, ch. 682, § 4, and that punitive damages were inappropriate as a matter of New York law and public policy. The Court found Celotex's arguments to be unpersuasive. While Celotex raised a substantive due process claim, arguing that multiple imposition of punitive damages for the same course of conduct offended fundamental fairness, the Court did not reach that issue since Celotex did not preserve it for appellate review. *Id.* at 398. In the instant case, the substantive due process claim that multiple imposition of punitive damages for the same course of conduct violated fundamental fairness has been preserved on appeal by only one appellant, Owens-Illinois, who raised this issue in its Memorandum in Support of a Motion for a Judgment Notwithstanding the Verdict. Appellant Celotex failed to raise this due process argument prior to briefing for this appeal. A careful reading of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss and for Summary Judgment does not bear out appellant Celotex's contention that this claim was raised. We decline to set aside the punitive damages awarded by the jury since there has been insufficient proof to demon-

strate an unjust result of multiple imposition of punitive damages for the same course of conduct.

Appellant Celotex asked this Court to take judicial notice of punitive damages in judgments against them in not only the Southern and Eastern Districts of New York, but in "appeals pending in other cases before this Court, as well as judgments entered in the dockets of the district courts of this and other circuits." Reply Brief for Defendant-Appellant The Celotex Corporation at 14. Appellant Owens-Illinois noted that it advised the trial court of punitive damage awards made, but not paid, in two Southern District cases. Plaintiff contends that substantial portions of the punitive damages assessed have not been paid out by appellants and that in some cases which have been settled or are still on appeal, no punitive damages have been paid at all. Appellants themselves provide no documentation as to exactly how much money they have actually paid in punitive damages.[1] The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process.

As the Court noted in *Racich*, "we do not write upon a clean slate . . . ." 887 F.2d at 399. In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 835 (2d Cir. 1967), a claim was made that multiple awards of punitive damages based upon the same course of conduct was a violation of due process. The Court observed that there was "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of

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1 Owens-Illinois has advised the Court post-argument in this case, that a punitive damage award in the amount of $554,194.00 was recently paid by it in *Passentino v. Raymark Indus.*, CV-87-5019 (S.D.N.Y.).

actions throughout the nation can be so administered as to avoid overkill." *Id.* at 839. The Court concluded, however, that "the New York cases afford no basis for our predicting that the Court of Appeals would adopt a rule disallowing punitive damages in a case such as [*Roginsky*], and the *Erie* doctrine wisely prevents our engaging in such extensive law-making on local tort liability . . . ." *Id.* at 841.

In *Racich*, the Court pointed out that while we did not reject the argument that an award of punitive damages unless governed by precise standards violates due process, we did not accept that argument, "believing that the only course open . . . was 'the more modest' task of 'assessing the sufficiency of the evidence within the framework' of New York law." 887 F.2d at 399 (quoting *Roginsky*, 378 F.2d at 841). The Court in *Racich* said:

> [W]e are here asked to hold . . . that the common-law standards applied by the courts of New York for imposition of punitive damages are unconstitutional, and that our own cases applying that law were in error . . . . This would be a far-reaching holding indeed, particularly in the context of mass tort litigation that suggests the need for a uniform, national rule on the issue. Under all the circumstances, we believe that such a step, if it is to be taken (and we express no view as to that), is best left for Congress or for higher judicial authority.

Id. (citations omitted). We follow this same course, and leave for another day and a better documented record the question of whether successive awards are violative of due process.

In the instant case, the trial judge informed the jury in his charge that punitive damages may be awarded if plaintiffs "clearly and convincingly established that the acts of a defendant [the jury was] considering causing the injury you [sic] complained of were wanton and reckless." Joint Appendix at 2123. An act was defined as wanton and reckless when "done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the results upon the rights and safety of others that may flow from doing the act, or in the manner in which it is done." *Id.* at 2124. No claim has been made by appellants that this charge was not in accordance with New York law.

A review of the evidence shows that the award of punitive damages was supported by the evidence as a matter of law. Plaintiff produced evidence at trial through expert witnesses, medical reports and documents from which the jury could reasonably conclude that appellants acted in a wanton or reckless manner. For example, plaintiff's expert witness testified that a link between asbestos and lung cancer was suspected as early as 1930 and that this link was considered to be probable shortly after 1940. Another expert witness stated in his deposition that by 1942 there were enough cases of the association between lung cancer and asbestos to include this information in a medical textbook on occupational cancer. A former employee of Owens-Illinois testified that workers at a New Jersey plant, including plant executives, wore respirators in the areas of loose raw material including asbestos. The jury was free to conclude from this and other evidence presented that appellants knew or should have known of the dangers of asbestos and did not adequately protect or warn

users of asbestos, thereby acting in a wanton or reckless manner.

Appellants further maintain that their procedural due process rights were violated by the manner in which the punitive damages claim was tried. Owens-Illinois specifically contends that the consolidation of *Johnson* and *Higgins* and the failure to erect procedural safeguards during the consolidated trial violated appellants' due process rights. Since we have found the consolidation was not an abuse of discretion, and since the trial judge carefully instructed the jury throughout the trial to consider each plaintiff's claims individually, there was no need to provide other procedural safeguards concerning the consolidation.

Owens-Illinois admits that it never specifically made a request for bifurcation of the damages aspect of the punitive damages claim, but argues that it did make a motion to bifurcate the entire punitive damages claim as well as a motion to trifurcate all triable issues. Appellant further argues that the trial judge granted bifurcation in a previous asbestos-related personal injury case. Plaintiff contends that the trial court invited appellants to bifurcate the damages aspect of the punitive damages claim and that appellants made a tactical decision not to give the jury two separate opportunities to assess damages against them. Regardless of appellants' motives in fashioning a motion for bifurcation, the fact that bifurcation did not occur is not necessarily prejudicial to appellants. The decision to bifurcate is within the discretion of the trial judge. *In re Master Key Antitrust Litigation*, 528 F.2d 5, 14 (2d Cir. 1975). The fact that a previous case tried by the same judge was bifurcated has no bearing on the instant case.

Conduct of the Court and Counsel

Appellants contend that improper conduct of the trial court and inflammatory conduct by plaintiff's counsel during summation denied them a fair and impartial trial.

Owens-Illinois alleges specifically that counsel described witnesses as "liar[s]", "sleaze" and "clown[s]." Appellants contend they were prejudiced both by counsel's use of the words "evil" and "vicious" to describe them, and counsel's characterization of appellants' defense as "obscene", "ugly" and "ridiculous." Appellants also complain of counsel's invocation of the "Golden Rule" (do unto others as you would have them do unto you) and the use of a strategy that included an appeal to class prejudice. This Court finds that counsel's behavior did not rise to the level of denying appellants a fair and impartial trial.

Throughout the normal course of the trial and in his final charge, the trial judge instructed the jury to decide the case in a rational manner based on the evidence presented and not on emotions, sympathy, prejudice, or bias. In denying appellants' motion for mistrial, the trial judge determined that none of the derogatory descriptive statements complained of was so inflammatory as to require a new trial. The court found that all but two of the counsel's alleged appeals to the Golden Rule argument related to liability only and not damages and were therefore not improper. *Burrage v. Harrell*, 537 F.2d 837 (5th Cir. 1976). The remaining two instances were determined to be of a nature that would not unduly affect the jury in light of the judge's charge. The appeal to class prejudice was found to be of a class of remarks which are not per se grounds for a new trial and in the

context of the entire summation, did not create undue passion. We agree. Great discretion is to be given the judge who was present throughout the trial and is best able to determine the effect of the conduct of counsel on the jury. *Arnold*, 681 F.2d at 194.

Appellants contend that the trial judge failed to control the behavior of plaintiff's counsel and that the judge himself contributed to an atmosphere not conducive to fair play by questioning the plaintiff and coaching his answers. Celotex points specifically to two exchanges between the judge and the plaintiff.[2]

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2 The judge asked Mr. Johnson "to remember what it was like back then and select the words that will describe it sufficiently so that these people here, who weren't there, can, in their minds, have some idea of what you saw." The judge then went on to question Mr. Johnson about what his work site looked like. Joint Appendix at 15.

In another instance, after plaintiff had described his feelings when learning of the results of his x-ray, the judge engaged Mr. Johnson in the following colloquy:

> THE COURT: Before you go on, since the jury is going to have to make some decisions on this, I think we ought to get a little more on this than we have. When you talked to Doctor Spinnato in December, he said go and have the CAT scan and pulmonary function test.
>
> I imagine you had some reaction to what he said to you.
>
> THE WITNESS: He just said he seen [sic] some spots on the X-ray.
>
> THE COURT: Did you react to that or no?
>
> THE WITNESS: I didn't know what to think. I didn't know what was wrong.
>
> THE COURT: Let me suggest some words to you over a different range and tell me if those—if any of these is an adequate explanation of what you were feeling.
>
> These are a whole bunch of alternatives not meant to suggest that any one is appropriate.
>
> . . . .
>
> . . . The question is whether any of these words, if any of these are appropriate. If none are appropriate, tell me.

The trial judge also brought to the attention of all counsel that he had heard testimony of one of appellants' expert witnesses in a previous case and had found the witness to be less than credible. One defense counsel expressed concern that the judge could sit fairly on the instant case and stated that the judge had been acting in an uncomplimentary manner throughout the witness' testimony. The judge denied defense counsel's characterization of his manner during the testimony.

It is well settled that a judge is authorized to ask questions of a witness which may aid the understanding of the jury. *United States v. Lamont*, 565 F.2d 212, 220 (2d Cir. 1977) *cert. denied*, 435 U.S. 914 (1978). In the instant case, Mr. Johnson has been described by his counsel and an expert appellant witness as a man of few words. It would appear then, that the judge was merely attempting to clarify matters that seemed to call for further explanation, as the judge told the jury in his charge.

As to the manner of the judge throughout the testimony of the expert witness, we are satisfied that his instructions to the jury cured even the appearance of any impropriety.[3] *United States v. Robinson*, 635 F.2d

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A reaction of calm, resigned, depressed, scared, are any of those appropriate?

THE WITNESS: Depressed and scared.

Joint Appendix at 31-32.

3 The judge stated:

Now, I don't reach a determination myself or express any opinion as to how you should decide the facts of the case; that's your function. That's why we have jurors.

(footnote continued)

981, 985 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981).

CONCLUSION

For the above-stated reasons the judgment of the district court is affirmed.

MAHONEY, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that the district court's decision to consolidate *Higgins* and *Johnson* was a permissible exercise of discretion, that a reasonable jury could find a causal connection between appellants' products and plaintiff's injury, and that there is no basis for reversal in the conduct of the trial court and plaintiff's counsel. I respectfully dissent, however, from the majority's conclusion that punitive damages are adequately supported by the evidentiary record, and would reverse the award of punitive damages as a matter of law. I accordingly would not reach, and do not join the majority's consideration of, appellants' constitutional objections to the imposition of punitive damages.

It's not my function to decide any of the facts in the case, and I haven't expressed, nor have I intended to convey any view as to how the facts are to be decided; as to which witnesses are or aren't worthy of belief; as to what facts are or are not established; or as to what inferences ought to be drawn from the evidence.

If any expression of mine during the course of this trial has seemed to indicate an opinion regarding any of these matters, I instruct you to disregard that expression entirely.

Joint Appendix at 2084.

Our tort law system reserves punitive damages for those extraordinary cases where an extra measure of payment—beyond full compensation for injuries—is thought to be necessary "for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 2, at 9 (5th ed. 1984). Thus, for example, punitive damages may be deemed appropriate where a defendant, while not intending to injure a plaintiff, exhibits "such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." *Id.* at 10. The case before us involves an application of that theory.

As the majority notes, the district court's jury instruction required a determination that defendant's conduct was "wanton or reckless" to sustain an award of punitive damages, and this is a correct statement of New York law. As we have said, however, in another diversity case where we undertook a thorough review of the applicable New York precedents, New York law contemplates that "the recklessness that will give rise to punitive damages must be close to criminality, see 14 N.Y. Jur., Damages § 181 p. 41, and . . . , like criminal conduct, it must be 'clearly established.' " *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832, 843 (2d Cir. 1967) (Friendly, J.). We went on to quote, *id.*, the definition in N.Y. Penal Law § 15.05(3) (McKinney 1987), since unchanged, as setting forth New York's view of recklessness. Section 15.05(3) provides in pertinent part:

> A person acts recklessly with respect to a result . . . when he is aware of and consciously disre-

> gards a substantial and unjustifiable risk that such result will occur . . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

I do not regard the evidence in this case as adequate for submission of punitive damages to the jury under these standards. The evidence at trial established that during the time Johnson worked in the Brooklyn Navy Yard, appellants were aware that the properties of asbestos were such that it could, at some level of exposure, injure a human being. From this, it is possible reasonably to conclude that appellants had a duty to warn or otherwise safeguard persons such as Johnson, and must now compensate him for whatever injuries are attributable to their failure to do so. The award of compensatory damages is therefore sustainable, even though Johnson never worked in an asbestos plant, and did not work directly with asbestos-containing products in the Brooklyn Navy Yard. In the circumstances, the jury did not exceed its authority in determining that appellants should have known that Johnson, and others similarly situated, were being put at risk.

Punitive damages, however, are not properly chargeable against a defendant who merely "should have known" of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it. *See Roginsky*, 378 F.2d at 843 (punitive damages proper where manufacturer shown "to have become aware of danger and to have done nothing, deliberately closing its eyes"). There has been no such showing here. All the evidence to which Johnson directs us relates to actions, correspondence and lit-

erature concerning asbestos processing plants, where workers had direct and sustained exposure to high concentration levels of asbestos fibers. This record contains *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that "bystanders" might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use. The award of punitive damages is, therefore, in my view unsustainable.

The majority reasons that the jury could conclude, on this record, "that appellants knew or should have known of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner." There are two problems with this rationale. First, as I have already noted, a "should have known" formulation simply does not equate with recklessness under New York law; actual awareness is required. *See Roginsky*, 378 F.2d at 843; N.Y. Penal Law § 15.05(3). Second, the majority paints with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

The clear implication is that once a product is shown to be dangerous to some persons under some circumstances, punitive damages can be awarded against a manufacturer who fails to anticipate its subsequently discovered propensity to endanger other persons in markedly different circumstances. This is hardly the "recklessness . . . close to criminality" which we described in *Roginsky* as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response—

even 'gross' error—is not enough to warrant submission of punitive damages to the jury." 378 F.2d at 843.

I therefore respectfully dissent from the majority's affirmance of the jury's awards of punitive damages.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States Courthouse
Foley Square
New York 10007
(212) 791-0103

ELAINE B. GOLDSMITH
Clerk

Date: April 20, 1990

RE : JOHNSON V THE CELOTEX CORP.

Docket No.: 89-7484, 89-7542

Gentlemen: /Madam:

The court has rendered a decision in the above-entitled case. The decision of the district court has been *affirmed* as of March 20, 1990, the judgment was entered on that date and copies of the opinion were mailed to all counsel. Enlcosed please a corrected opinion by Judge Carman and revised concurrence and dissent by Judge Mahoney.

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with § 0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Very truly yours,

ELAINE B. GOLDSMITH, *Clerk*
by

O.M. GEORGE

O.M. George
Deputy Clerk

056 1/21/86

[CORRECTED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 342—August Term, 1989

(Argued: November 2, 1989 Decided: March 20, 1990)

Docket Nos. 89-7484, 89-7542

JOHN E. JOHNSON and h/w ANN MARIE JOHNSON,

Plaintiffs-Appellees,

—against—

THE CELOTEX CORPORATION, OWENS-ILLINOIS, INC.,

Defendants-Appellants.

Before:

MINER and MAHONEY, *Circuit Judges*,
and CARMAN, *Judge*.*

Defendant-appellant The Celotex Corporation appeals from a judgment entered after a jury verdict and from orders of the United States District Court for the South-

* Honorable Gregory W. Carman, Judge, United States Court of International Trade, sitting by designation.

ern District of New York regarding Joint Eastern and Southern Districts Asbestos Litigation, (Sifton, J.), denying its motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial and for a mistrial. Defendant-appellant Owens-Illinois, Inc. appeals from the same judgment and from orders denying its motion for judgment notwithstanding the verdict and its motion for a new trial or, in the alternative, for a remittitur.

Affirmed. Judge Mahoney concurs in part and dissents in part in a separate opinion.

STEVEN J. PHILLIPS, New York, New York (LEVY PHILLIPS & KONIGSBERG, Diane Paolicelli, New York, New York, of counsel), *for Plaintiffs-Appellees.*

ANDREW T. BERRY, Newark, New Jersey (MCCARTER & ENGLISH, Newark, New Jersey, of counsel), *for Defendant-Appellant The Celotex Corporation.*

FRANK H. SANTORO, Hartford, Connecticut (DANAHER, TEDFORD, LAGNESE & NEAL, P.C., Joyce A. Lagnese, Paul J. Narducci, Wendy W. Wanchak, Hartford, Connecticut, of counsel), *for Defendant-Appellant Owens-Illinois, Inc.*

CARMAN, *Judge*:

Defendant-appellant The Celotex Corporation (Celotex or appellant) appeals from a judgment entered in the Southern District of New York after a jury trial before Charles P. Sifton, J., regarding Joint Eastern and Southern Districts Asbestos Litigation, awarding compensatory and punitive damages and damages for loss of consortium in an asbestos products liability personal injury case. Celotex appeals from orders denying its motion for judgment notwithstanding the verdict, or in the alternative, a new trial and for a mistrial. Defendant-appellant, Owens-Illinois, Inc. (Owens-Illinois or appellant) appeals from the same judgment and orders denying its motion for judgment notwithstanding the verdict and its motion for a new trial or, in the alternative, for a remittitur.

Appellants request us to reverse the judgment below or, in the alternative, vacate the judgment and remand for a new trial. In the alternative, appellants ask us to vacate the punitive damages award and remand for a new trial on the issue of punitive damages.

BACKGROUND

This appeal is one of many which arises from thousands of cases filed against manufacturers and producers of asbestos, resulting in unparalleled litigation in American tort law. *See Racich v. Celotex Corp.*, 887 F.2d 393, 394 (2d Cir. 1989); *In re School Asbestos Litigation*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The cases have been filed pursuant to New York's one-year revival statute for certain toxic torts,

including alleged asbestos related torts, 1986 N.Y. Laws, ch. 682, § 4. To manage the litigation, all of the cases in the Southern and Eastern Districts were assigned for pre-trial purposes to Judge Sifton. *Racich*, 887 F.2d at 395.

At a pretrial conference on November 4, 1988, the court proposed that another asbestos tort case, *Higgins v. Raymark Industries, Inc.*, CV-87-0537 (S.D.N.Y.), be consolidated with *Johnson* which was scheduled for trial on November 7, 1988. The trial court ordered on November 7, 1988 that *Higgins* and *Johnson* be consolidated for trial. Plaintiff Higgins, a chipper and caulker, whose work included chipping off welded sections to prepare for repair work of others, was alleged to have died because of exposure to asbestos while at the Brooklyn Navy Yard from approximately 1946 to 1966. Appellee-plaintiff, John Johnson (plaintiff), an electrician's helper, alleged that he had contracted lung disease while working at the Brooklyn Navy Yard from 1942 to 1945 by inhaling asbestos fibers during this employment.

In *Johnson* and *Higgins* compensatory and punitive damages were sought for claims sounding in negligence and strict liability for defendants' failure to warn of the health risks of their asbestos-containing products.

The Court declined to trifurcate or bifurcate the trial to separate issues of causation and compensatory damages from issues of liability and punitive damages. Appellants' motions to have separate juries consider claims of liability and punitive damages in *Johnson*, apart from claims in *Higgins*, were denied. Appellants' motion to preclude all evidence of knowledge post-1945 in relation to plaintiff Johnson was denied. Eight defendants settled and one filed a petition in bankruptcy prior

to trial. The *Higgins* and *Johnson* cases proceeded to trial against defendants Celotex, Owens-Illinois and Raymark Industries, Inc. (Raymark). The jury rendered a verdict for the plaintiffs in both cases. In *Higgins*, plaintiff was awarded $1 million in compensatory damages and $3 million in punitive damages, divided equally among Celotex, Raymark and Owens-Illinois. In *Johnson* compensatory damages were $350,000 (Celotex 12.5%, Raymark 12.5%, Owens-Illinois 5.0%, seven settling co-defendants 10% each), and punitive damages were assessed as follows: Celotex $1 million, Raymark $1 million and Owens-Illinois $800,000. Plaintiff Ann Marie Johnson was awarded $30,000 for loss of services.

After the verdict, but before entry of judgment, it was discovered that Celotex had never been named or served as a defendant in the *Higgins* case. Further, since Florida was the principal place of business of Celotex and the residence of plaintiff in *Higgins*, the trial court determined there was lack of diversity as to Celotex.

In response to post-trial motions the Court ordered an amendment to the pleadings to add Celotex as a party-defendant pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. The Court then dismissed the complaint in the *Higgins* case as to Celotex for lack of jurisdiction and retained its diversity jurisdiction over defendants Raymark and Owens-Illinois. A subsequent bankruptcy proceeding has stayed this case with regard to Raymark.

FACTS

Plaintiff John Johnson, an employee of the United States Navy, worked as an electrician's helper at the

Brooklyn Navy Yard from 1942 to 1945. The Brooklyn Navy Yard covered an area of about three miles and in the entire yard there were approximately 20 ships under construction or repair. He installed electrical wiring in new and older ships. Although Johnson did not work with any product that he knew contained asbestos, he worked in the vicinity of other tradespeople who installed asbestos insulation material on ships. Johnson could not identify by name any workers in his vicinity or the trade name or manufacturer of any asbestos materials used at the shipyard. Johnson recalled working on destroyers, battleships and in particular remembered working on the *Iowa*, the *Missouri* and the *Franklin* at the yard. He testified that his work area was always dusty and that he would brush off a very fine snow-like dust that accumulated on his clothes.

Product identification testimony was based upon the testimony of other workers employed at the Navy Yard at approximately the same time as Johnson. The co-workers identified over a dozen makers of asbestos-containing products used at the Navy Yard at different times.

In 1945, Johnson left the Navy Yard and was not later exposed to any other asbestos containing products. In 1985, after retirement, Johnson was diagnosed with a lung condition which was attributed to asbestos exposure.

CONTENTIONS OF THE PARTIES

Appellants contend the trial court abused its discretion in consolidating the *Johnson* and *Higgins* cases. They further urge the connection with plaintiff's injury

and appellants' products was insufficient as a matter of law. As to the issue of punitive damages, appellants maintain the Fourteenth Amendment bars an award of punitive damages because appellants have been subjected to repeated punitive damages for the same course of conduct. They also claim procedural due process violations and contend that the punitive damages were not supported by the evidence as a matter of law. Lastly, appellants claim the improper conduct of the trial court together with inflammatory conduct by counsel for plaintiff and improper rulings allowed the jury to hear evidence that should not have been heard, all resulting in a verdict which was the result of pressure and prejudice and which should be revised.

Appellants seek reversal of the judgment, or in the alternative, request that the judgment be vacated and the case be remanded for a new trial as to all issues. Celotex requests that in the alternative, the punitive damage award should be vacated and the case remanded on the issue of punitive damages. Plaintiff seeks affirmance of the judgment below.

DISCUSSION

Consolidation

Rule 42(a) of the Federal Rules of Civil Procedure empowers a trial judge to consolidate actions for trial when there are common questions of law or fact to avoid unnecessary costs or delay. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3d Cir. 1964), *cert. denied*, 382 U.S. 812 (1965); *Zervos v. S.S. Sam Houston*, 427 F. Supp. 500 (S.D.N.Y. 1976), *aff'd*, 636 F.2d 1202 (2d Cir. 1980).

Consolidation of tort actions sharing common questions of law and fact is commonplace. *See, e.g., Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969). This is true of asbestos-related personal injury cases as well. *See, e.g., Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985); *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250 (S.D. Tex. 1985).

The trial court has broad discretion to determine whether consolidation is appropriate. *See, e.g., Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491 (N.D. Ill. 1983); *Stemler v. Burke*, 344 F.2d 393 (6th Cir. 1965). In the exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation. *See, e.g., Romacho v. Stanley*, 567 F. Supp. 1417, 1419 n.2 (S.D.N.Y. 1983), *aff'd sub nom. Morse v. Stanley*, 732 F.2d 1139 (2d Cir. 1984). However, the discretion to consolidate is not unfettered. *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984). Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). When exercising its discretion, the court must consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and availa-

> ble judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Hendrix, 776 F.2d at 1495 (quoting *Arnold*, 681 F.2d at 193). When considering consolidation, a court should also note that the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff. *Id.*

In the instant case, the court properly exercised its discretion in consolidating these two cases for trial. Courts in the Southern and Eastern Districts of New York have used the criteria outlined in an unreported Maryland district court case, *In re All Asbestos Cases Pending in the United States District Court for the District of Maryland*, slip op. (D. Md. Dec. 16, 1983) (en banc), (hereinafter *In re Maryland Asbestos Cases*) as a guideline in determining whether to consolidate asbestos exposure cases. *See, e.g., In re Joint Eastern and Southern Districts Asbestos Litigation*, 125 F.R.D. 60, 64 (E.D.N.Y./S.D.N.Y. 1989); *In re Joint Eastern and Southern Districts Asbestos Litigation*, slip op. at 7 (E.D.N.Y./S.D.N.Y. Jan. 16, 1990). In *In re Maryland Asbestos Cases*, the criteria included: "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged . . . ." *In re Maryland Asbestos Cases* at 3. *Johnson* and *Higgins* had the following characteristics: (1) common worksite;

(2) similar occupation to the extent that both workers were exposed to asbestos in a bystander capacity (they worked in trades that did not involve direct handling of asbestos products); (3) Johnson's period of exposure was from 1942 to 1945 while Higgins' exposure was from approximately 1946 to 1966; (4) Johnson contended that he suffered from asbestosis and asbestosis-related pleural disease while it was alleged that Higgins died as a result of asbestosis and lung disease; (5) Johnson was living and Higgins was deceased; (6) *Johnson* and *Higgins* were both ready for trial; and (7) all plaintiffs were represented by the same counsel. Instructions were given throughout the trial and in the charge to caution the jury to consider each plaintiff's claims individually. Two separate verdict forms were provided to the jury, one for *Johnson*, the other for *Higgins*.

An appellate court will not disturb a trial court's decision to consolidate unless a clear abuse of discretion is shown. *Hendrix*, 776 F.2d at 1495. In the instant case, the trial court was well within its discretion to consolidate the two cases and the court acted throughout in a manner which ensured that each plaintiff's claim was considered separately.

Connection Between Plaintiff's Injury and Appellants' Product

In order to succeed on his claim, plaintiff had the burden of proving to the jury that he was exposed to appellants' merchandise and that it is more likely than not that this exposure was a substantial factor in his injury. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980). Plaintiff had to establish that his injury was proximately

caused by appellants' asbestos and produce evidence identifying each appellant's product as being a factor in his injury. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, *cert. denied*, 110 S. Ct. 350 (1989). Plaintiff admits to presenting to the jury "an unusually detailed circumstantial case." Plaintiff contends that by the "cumulative and uncontradicted nature" of the case, the jury was able to conclude not only that there was exposure, but was compelled to come to that result.

Plaintiff worked at the Navy Yard from 1942 to 1945 as an electrician's helper on board ships including the *Missouri*, the *Iowa* and the *Franklin*. Testimony was provided by eleven men who worked at the Navy Yard in various capacities, some during the same time period as Johnson, some before and after plaintiff's employment. Witness James Shannon worked at the Navy Yard from 1940 to 1965 as a plumber's helper and a welder. Shannon recalled working on the *Iowa* at some time between 1940 and 1944 and identified Philip Carey (Celotex) products, including fifty-pound bags of asbestos cement with the words "Philip Carey" written on them, and Owens-Illinois products, including asbestos pipe covering and the brown boxes containing this material both bearing the name "Owens-Illinois," as being in use during that time period on board the *Iowa*. Shannon's testimony indicated that the only two ships he worked on during the time period 1940-1944 were the *North Carolina* and the *Iowa*. He remembered working first on the *North Carolina*, for at least one year and possibly two, before working on the *Iowa*. From his testimony, the jury could infer that he worked on the *Iowa* during the latter part of this time frame which would

place Shannon and Johnson on the *Iowa* at the same time.

Several of the witnesses testified as to the close interaction of the different crews working together. Moe Rapchik, a sheet metal worker from 1941 to 1945 who worked on board the *Iowa* in 1942, stated that in the course of his employment he worked with "almost every different crew that the Navy Yard had to offer which was electricians, machinists, shipfitters, pipefitters and asbestos installers." Joint Appendix at 322. Although Rapchik could not recall the specific company names of the products used on board the *Iowa*, he identified Owens-Illinois' Kaylo pipe covering and Celotex's Philip Carey asbestos cement as being in use during the time period 1941 to 1945 and stated that the products installed on the *Iowa* were the same types of products that were installed on every other ship he worked on. Rapchik described the asbestos fibers in general as being "[a]ll over the deck . . . . We crushed them with our feet as we walked . . . and that is how we got it all over our clothes and when we got home at night, we were white all over." Joint Appendix at 329. These descriptions conform to plaintiff's own testimony of working in close, dusty surroundings with other crew members.

Appellants contend that there was insufficient evidence to establish proximate cause and that therefore the case should not have gone to the jury. As an appellate court, we are " 'bound to view the evidence in the light most favorable to [the plaintiff] and to give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.' " *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.) (quoting

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962)), *cert. denied*, 429 U.S. 885 (1976). As the Sixth Circuit noted in *Pratt v. National Distillers & Chemical Corp.*, "We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did." 853 F.2d 1329, 1337 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989). Reviewing the evidence in the light most favorable to the plaintiff, we find that proximate cause existed and that the jury's verdict must be upheld.

Punitive Damages

Appellants contend that the Fourteenth Amendment bars the award of punitive damages in this case because subjecting the appellants to repeated punitive damages violates their substantive due process rights. Appellants further maintain that their procedural due process rights were violated by the way in which the punitive damages claim was tried in this case. They also claim that the award of punitive damages was not supported by the evidence as a matter of law.

Appellants argue that the multiple imposition of punitive damages against them for the same course of conduct offends the fundamental fairness inherent in due process. They cite *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909, 2921 (1989), where the Supreme Court explicitly refused to consider "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" because this question was

not before the court. While refraining from addressing this issue directly, the opinions made clear that this question was a substantial one. *Id.* at 2921 n.23. See also the opinions by Justice Brennan (joined by Justice Marshall), *id.* at 2923-24, and Justice O'Connor (joined by Justice Stevens), *id.* at 2924.

This Court recently reviewed the issue of punitive damages in an asbestos-related personal injury action in *Racich v. Celotex Corp.*, 887 F.2d 393. In *Racich*, appellant Celotex contended, *inter alia*, that the plaintiff's claim for punitive damages was not permitted under New York's one-year revival statute, 1986 N.Y. Laws, ch. 682, § 4, and that punitive damages were inappropriate as a matter of New York law and public policy. The Court found Celotex's arguments to be unpersuasive. While Celotex raised a substantive due process claim, arguing that multiple imposition of punitive damages for the same course of conduct offended fundamental fairness, the Court did not reach that issue since Celotex did not preserve it for appellate review. *Id.* at 398. In the instant case, the substantive due process claim that multiple imposition of punitive damages for the same course of conduct violated fundamental fairness has been preserved on appeal by only one appellant, Owens-Illinois, who raised this issue in its Memorandum in Support of a Motion for a Judgment Notwithstanding the Verdict. Appellant Celotex failed to raise this due process argument prior to briefing for this appeal. A careful reading of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss and for Summary Judgment does not bear out appellant Celotex's contention that this claim was raised. We decline to set aside the punitive damages awarded by the jury since there has been insufficient proof to demon-

strate an unjust result of multiple imposition of punitive damages for the same course of conduct.

Appellant Celotex asked this Court to take judicial notice of punitive damages in judgments against them in not only the Southern and Eastern Districts of New York, but in "appeals pending in other cases before this Court, as well as judgments entered in the dockets of the district courts of this and other circuits." Reply Brief for Defendant-Appellant The Celotex Corporation at 14. Appellant Owens-Illinois noted that it advised the trial court of punitive damage awards made, but not paid, in two Southern District cases. Plaintiff contends that substantial portions of the punitive damages assessed have not been paid out by appellants and that in some cases which have been settled or are still on appeal, no punitive damages have been paid at all. Appellants themselves provide no documentation as to exactly how much money they have actually paid in punitive damages.[1] The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process.

As the Court noted in *Racich*, "we do not write upon a clean slate . . . ." 887 F.2d at 399. In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 835 (2d Cir. 1967), a claim was made that multiple awards of punitive damages based upon the same course of conduct was a violation of due process. The Court observed that there was "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of

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1 Owens-Illinois has advised the Court post-argument in this case, that a punitive damage award in the amount of $554,194.00 was recently paid by it in *Passentino v. Raymark Indus.*, CV-87-5019 (S.D.N.Y.).

actions throughout the nation can be so administered as to avoid overkill." *Id.* at 839. The Court concluded, however, that "the New York cases afford no basis for our predicting that the Court of Appeals would adopt a rule disallowing punitive damages in a case such as [*Roginsky*], and the *Erie* doctrine wisely prevents our engaging in such extensive law-making on local tort liability . . . ." *Id.* at 841.

In *Racich*, the Court pointed out that while we did not reject the argument that an award of punitive damages unless governed by precise standards violates due process, we did not accept that argument, "believing that the only course open . . . was 'the more modest' task of 'assessing the sufficiency of the evidence within the framework' of New York law." 887 F.2d at 399 (quoting *Roginsky*, 378 F.2d at 841). The Court in *Racich* said:

> [W]e are here asked to hold . . . that the common-law standards applied by the courts of New York for imposition of punitive damages are unconstitutional, and that our own cases applying that law were in error. . . . This would be a far-reaching holding indeed, particularly in the context of mass tort litigation that suggests the need for a uniform, national rule on the issue. Under all the circumstances, we believe that such a step, if it is to be taken (and we express no view as to that), is best left for Congress or for higher judicial authority.

Id. (citations omitted). We follow this same course, and leave for another day and a better documented record the question of whether successive awards are violative of due process.

In the instant case, the trial judge informed the jury in his charge that punitive damages may be awarded if plaintiffs "clearly and convincingly established that the acts of a defendant [the jury was] considering causing the injury you [sic] complained of were wanton and reckless." Joint Appendix at 2123. An act was defined as wanton and reckless when "done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the results upon the rights and safety of others that may flow from doing the act, or in the manner in which it is done." *Id.* at 2124. No claim has been made by appellants that this charge was not in accordance with New York law.

A review of the evidence shows that the award of punitive damages was supported by the evidence as a matter of law. Plaintiff produced evidence at trial through expert witnesses, medical reports and documents from which the jury could reasonably conclude that appellants acted in a wanton or reckless manner. For example, plaintiff's expert witness testified that a link between asbestos and lung cancer was suspected as early as 1930 and that this link was considered to be probable shortly after 1940. Another expert witness stated in his deposition that by 1942 there were enough cases of the association between lung cancer and asbestos to include this information in a medical textbook on occupational cancer. A former employee of Owens-Illinois testified that workers at a New Jersey plant, including plant executives, wore respirators in the areas of loose raw material including asbestos. The jury was free to conclude from this and other evidence presented that appellants knew of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner.

Appellants further maintain that their procedural due process rights were violated by the manner in which the punitive damages claim was tried. Owens-Illinois specifically contends that the consolidation of *Johnson* and *Higgins* and the failure to erect procedural safeguards during the consolidated trial violated appellants' due process rights. Since we have found the consolidation was not an abuse of discretion, and since the trial judge carefully instructed the jury throughout the trial to consider each plaintiff's claims individually, there was no need to provide other procedural safeguards concerning the consolidation.

Owens-Illinois admits that it never specifically made a request for bifurcation of the damages aspect of the punitive damages claim, but argues that it did make a motion to bifurcate the entire punitive damages claim as well as a motion to trifurcate all triable issues. Appellant further argues that the trial judge granted bifurcation in a previous asbestos-related personal injury case. Plaintiff contends that the trial court invited appellants to bifurcate the damages aspect of the punitive damages claim and that appellants made a tactical decision not to give the jury two separate opportunities to assess damages against them. Regardless of appellants' motives in fashioning a motion for bifurcation, the fact that bifurcation did not occur is not necessarily prejudicial to appellants. The decision to bifurcate is within the discretion of the trial judge. *In re Master Key Antitrust Litigation*, 528 F.2d 5, 14 (2d Cir. 1975). The fact that a previous case tried by the same judge was bifurcated has no bearing on the instant case.

Conduct of the Court and Counsel

Appellants contend that improper conduct of the trial court and inflammatory conduct by plaintiff's counsel during summation denied them a fair and impartial trial.

Owens-Illinois alleges specifically that counsel described witnesses as "liar[s]", "sleaze" and "clown[s]." Appellants contend they were prejudiced both by counsel's use of the words "evil" and "vicious" to describe them, and counsel's characterization of appellants' defense as "obscene", "ugly" and "ridiculous." Appellants also complain of counsel's invocation of the "Golden Rule" (do unto others as you would have them do unto you) and the use of a strategy that included an appeal to class prejudice. This Court finds that counsel's behavior did not rise to the level of denying appellants a fair and impartial trial.

Throughout the normal course of the trial and in his final charge, the trial judge instructed the jury to decide the case in a rational manner based on the evidence presented and not on emotions, sympathy, prejudice, or bias. In denying appellants' motion for mistrial, the trial judge determined that none of the derogatory descriptive statements complained of was so inflammatory as to require a new trial. The court found that all but two of the counsel's alleged appeals to the Golden Rule argument related to liability only and not damages and were therefore not improper. *Burrage v. Harrell*, 537 F.2d 837 (5th Cir. 1976). The remaining two instances were determined to be of a nature that would not unduly affect the jury in light of the judge's charge. The appeal to class prejudice was found to be of a class of remarks which are not per se grounds for a new trial and in the

context of the entire summation, did not create undue passion. We agree. Great discretion is to be given the judge who was present throughout the trial and is best able to determine the effect of the conduct of counsel on the jury. *Arnold*, 681 F.2d at 194.

Appellants contend that the trial judge failed to control the behavior of plaintiff's counsel and that the judge himself contributed to an atmosphere not conducive to fair play by questioning the plaintiff and coaching his answers. Celotex points specifically to two exchanges between the judge and the plaintiff.[2]

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2 The judge asked Mr. Johnson "to remember what it was like back then and select the words that will describe it sufficiently so that these people here, who weren't there, can, in their minds, have some idea of what you saw." The judge then went on to question Mr. Johnson about what his work site looked like. Joint Appendix at 15.

In another instance, after plaintiff had described his feelings when learning of the results of his x-ray, the judge engaged Mr. Johnson in the following colloquy:

> THE COURT: Before you go on, since the jury is going to have to make some decisions on this, I think we ought to get a little more on this than we have. When you talked to Doctor Spinnato in December, he said go and have the CAT scan and pulmonary function test.
>
> I imagine you had some reaction to what he said to you.
>
> THE WITNESS: He just said he seen [sic] some spots on the X-ray.
>
> THE COURT: Did you react to that or no?
>
> THE WITNESS: I didn't know what to think. I didn't know what was wrong.
>
> THE COURT: Let me suggest some words to you over a different range and tell me if those—if any of these is an adequate explanation of what you were feeling.
>
> These are a whole bunch of alternatives not meant to suggest that any one is appropriate.
>
> . . . .
>
> . . . The question is whether any of these words, if any of these are appropriate. If none are appropriate, tell me.

The trial judge also brought to the attention of all counsel that he had heard testimony of one of appellants' expert witnesses in a previous case and had found the witness to be less than credible. One defense counsel expressed concern that the judge could sit fairly on the instant case and stated that the judge had been acting in an uncomplimentary manner throughout the witness' testimony. The judge denied defense counsel's characterization of his manner during the testimony.

It is well settled that a judge is authorized to ask questions of a witness which may aid the understanding of the jury. *United States v. Lamont*, 565 F.2d 212, 220 (2d Cir. 1977) *cert. denied*, 435 U.S. 914 (1978). In the instant case, Mr. Johnson has been described by his counsel and an expert appellant witness as a man of few words. It would appear then, that the judge was merely attempting to clarify matters that seemed to call for further explanation, as the judge told the jury in his charge.

As to the manner of the judge throughout the testimony of the expert witness, we are satisfied that his instructions to the jury cured even the appearance of any impropriety.[3] *United States v. Robinson*, 635 F.2d

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A reaction of calm, resigned, depressed, scared, are any of those appropriate?

THE WITNESS: Depressed and scared.

Joint Appendix at 31-32.

3 The judge stated:

Now, I don't reach a determination myself or express any opinion as to how you should decide the facts of the case; that's your function. That's why we have jurors.

(footnote continued)

981, 985 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981).

CONCLUSION

For the above-stated reasons the judgment of the district court is affirmed.

MAHONEY, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that the district court's decision to consolidate *Higgins* and *Johnson* was a permissible exercise of discretion, that a reasonable jury could find a causal connection between appellants' products and plaintiff's injury, and that there is no basis for reversal in the conduct of the trial court and plaintiff's counsel. I respectfully dissent, however, from the majority's conclusion that punitive damages are adequately supported by the evidentiary record, and would reverse the award of punitive damages as a matter of law. I accordingly would not reach, and do not join the majority's consideration of, appellants' constitutional objections to the imposition of punitive damages.

It's not my function to decide any of the facts in the case, and I haven't expressed, nor have I intended to convey any view as to how the facts are to be decided; as to which witnesses are or aren't worthy of belief; as to what facts are or are not established; or as to what inferences ought to be drawn from the evidence.

If any expression of mine during the course of this trial has seemed to indicate an opinion regarding any of these matters, I instruct you to disregard that expression entirely.

Joint Appendix at 2084.

Our tort law system reserves punitive damages fo
those extraordinary cases where an extra measure o
payment—beyond full compensation for injuries—i
thought to be necessary "for the purpose of punishin
the defendant, of teaching the defendant not to do i
again, and of deterring others from following the defen
dant's example." W. Keeton, D. Dobbs, R. Keeton &
D. Owen, Prosser and Keeton on the Law of Torts § 2
at 9 (5th ed. 1984). Thus, for example, punitive damage
may be deemed appropriate where a defendant, whil
not intending to injure a plaintiff, exhibits "such a con
scious and deliberate disregard of the interests of other
that his conduct may be called wilful or wanton." *Id.* a
10. The case before us involves an application of tha
theory.

As the majority notes, the district court's jury instruc
tion required a determination that defendant's conduc
was "wanton or reckless" to sustain an award of puni
tive damages, and this is a correct statement of Ne
York law. As we have said, however, in another diver
sity case where we undertook a thorough review of th
applicable New York precedents, New York law contem
plates that "the recklessness that will give rise to puni
tive damages must be close to criminality, see 14 N.Y
Jur., Damages § 181 p. 41, and . . . , like crimina
conduct, it must be 'clearly established.' " *Roginsky v
Richardson-Merrill, Inc.*, 378 F.2d 832, 843 (2d Ci
1967)(Friendly, J.). We went on to quote, *id.*, the defi
nition in N.Y. Penal Law § 15.05(3)(McKinney 1987)
since unchanged, as setting forth New York's view o
recklessness. Section 15.05(3) provides in pertinent part

> A person acts recklessly with respect to a resul
> . . . when he is aware of and consciously disre

> gards a substantial and unjustifiable risk that such result will occur. . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

I do not regard the evidence in this case as adequate for submission of punitive damages to the jury under these standards. The evidence at trial established that during the time Johnson worked in the Brooklyn Navy Yard, appellants were aware that the properties of asbestos were such that it could, at some level of exposure, injure a human being. From this, it is possible reasonably to conclude that appellants had a duty to warn or otherwise safeguard persons such as Johnson, and must now compensate him for whatever injuries are attributable to their failure to do so. The award of compensatory damages is therefore sustainable, even though Johnson never worked in an asbestos plant, and did not work directly with asbestos-containing products in the Brooklyn Navy Yard. In the circumstances, the jury did not exceed its authority in determining that appellants should have known that Johnson, and others similarly situated, were being put at risk.

Punitive damages, however, are not properly chargeable against a defendant who merely "should have known" of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it. *See Roginsky*, 378 F.2d at 843 (punitive damages proper where manufacturer shown "to have become aware of danger and to have done nothing, deliberately closing its eyes"). There has been no such showing here. All the evidence to which Johnson directs us relates to actions, correspondence and lit-

erature concerning asbestos processing plants, where workers had direct and sustained exposure to high concentration levels of asbestos fibers. This record contains *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that "bystanders" might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use. The award of punitive damages is, therefore, in my view unsustainable.

The majority reasons that the jury could conclude, on this record, "that appellants knew of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner." The majority paints with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

The clear implication is that once a product is shown to be dangerous to some persons under some circumstances, punitive damages can be awarded against a manufacturer who fails to anticipate its subsequently discovered propensity to endanger other persons in markedly different circumstances. This is hardly the "recklessness . . . close to criminality" which we described in *Roginsky* as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response—even 'gross' error—is not enough to warrant submission of punitive damages to the jury." 378 F.2d at 843.

I therefore respectfully dissent from the majority's affirmance of the jury's awards of punitive damages.

UNITED STATES DISTRICT COURT

E.D. New York
S.D. New York

Feb. 3, 1989

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION

This Document Relates To:

Johnson (CV-87-0724 (S.D.N.Y.)

Higgins (CV-87-0537 (S.D.N.Y.)

Nos. CV-87-0724, CV-87-0537

MEMORANDUM AND ORDER

SIFTON, *District Judge.*

These two asbestos-related personal injury cases are before the court on seven motions made after the jury's verdicts. Four of the motions arise because of the extraordinary circumstance that one allegedly non-diverse party proceeded through trial and verdict although never named in the complaint or served with process.

The facts are not disputed except as noted. The *Higgins* and *Johnson* cases were consolidated for trial before the undersigned and a jury. All parties assumed that Celotex Corp., Raymark Industries, Inc., and Owens-Illinois, Inc. were named as defendants in both cases. After trial, the jury rendered a verdict for plaintiffs in both cases, holding all three defendants liable as follows:

Higgins:		
Compensatory damages:		$1,000,000
Percentage of responsibility:		
Mr. Higgins	10%	
Higgins:		
Celotex	10%	
Raymark	10%	
Owens-Illinois	10%	
Ten settling co-defendants	6% each	
Punitive damages:		
Celotex		$1,000,000
Raymark		$1,000,000
Owens-Illinois		$1,000,000
Johnson:		
Compensatory damages:		$ 350,000
Percentage of responsibility:		
Celotex	12.5%	
Raymark	12.5%	
Owens-Illinois	5.0%	
Seven settling co-defendants	10.0% each	
Punitive damages:		
Celotex		$1,000,000
Raymark		$1,000,000
Owens-Illinois		$ 800,000

After the verdict but before entry of judgment, it became clear that Celotex had never been named or served as a defendant in *Higgins*, apparently because both Higgins and Celotex were thought to be Florida citizens.

Celotex is incorporated in Delaware, but a corporation is also a citizen of the state of its principal place of business. 28 U.S.C. § 1332(c). Defendants assert that Celotex's principal place of business is in Florida, based on a terse affidavit from one D.S. Gibson, Manager of Safety and Property Conservation for Celotex. Plaintiff has not applied for leave to file an amended complaint alleging diversity and has failed

to present any evidence concerning Celotex's principal place of business at the time these actions were commenced. Since the burden of pleading and proof is on plaintiff to establish diversity, I shall proceed on the premise that diversity is lacking between Celotex and plaintiff in the *Higgins* case. Entry of judgment on this decision will, however, be stayed until February 15, 1989, to permit plaintiff to file an amended complaint in the event it can do so in compliance with Rule 11 of the Federal Rules of Civil Procedure.

The motions before the court are as follows: (1) a motion by plaintiffs, in which Owens-Illinois joins, to amend the complaint under F.R.Civ.P. 15(b) to allege causes of action against Celotex; (2) a motion by defendants to dismiss both cases for lack of subject matter jurisdiction; (3) a motion by plaintiff to drop Celotex as a defendant under Rule 21; (4) a motion by Owens-Illinois to dismiss for failure to join an indispensable party under Rule 19(b); (5) a motion by plaintiff to set aside that portion of the *Higgins* verdict finding Mr. Higgins comparatively negligent; (6) a motion by Owens-Illinois for determination of offsets required by settlements with co-defendants under N.Y.Gen.Oblig.L. § 15-108; and (7) a motion by defendants for a new trial because of improper statements made during plaintiff's closing arguments.

The four motions relating to subject matter jurisdiction are closely interrelated. In summary, their disposition is as follows. The complaint is deemed amended to add Celotex as a party defendant; this leads to a lack of complete diversity between the parties; Celotex is therefore dropped as a defendant under Rule 21 or 15(a) in order to preserve jurisdiction over the other parties, because this does not cause prejudice to the other defendants within the meaning of Rule 19.

MOTION TO AMEND COMPLAINT

Plaintiff, joined by Owens-Illinois, moves for amendment of the *Higgins* complaint under F.R.Civ.P. 15(b) to add Celotex as a party. Of course, this motion alone cannot affect subject matter jurisdiction one way or the other. Even

if Celotex's having proceeded through the trial is deemed consent to trying the issue of its liability, this consent could not confer subject matter jurisdiction on the court. Nevertheless, it is appropriate to rule upon this Rule 15(b) motion because of the bearing it has on the motion to dismiss for lack of subject matter jurisdiction.

Implied consent to the trial of an issue will be found, in general, when the parties "recognized that an issue not presented by the pleadings entered the case at trial." 6 C. Wright and A. Miller, *Federal Practice and Procedure* § 1493, at 462. "In a motion under rule 15(b) . . . the most important question is whether the new issues were tried by the parties' express or implied consent and whether the defendant 'would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.' " *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977) (citations omitted).

This implied consent can be inferred from a party's failure to object to the introduction of evidence relating to the issue, *see, e.g., Sun-Fun Prods., Inc. v. Suntan Research and Devel. Inc.*, 656 F.2d 186 (5th Cir. 1981), and from the introduction of evidence on that issue by the very party opposing the implied amendment, *see, e.g., Bradford Audio Corp. v. Pious*, 392 F.2d 67, 73 (2d Cir. 1968). Both of these bases of inference are present in the instant case. Nor are any countervailing factors present that would tend to show lack of consent: a party's not having been represented by an attorney; the evidence supporting consent having all also borne on issues that were expressly included in the pleadings; or "prejudice" to a party, "prejudice in this context mean[ing] a lack of opportunity to prepare to meet the unpleaded issue." 6 C. Wright and A. Miller, *supra*, § 1493, at 467-68.

Rule 15(b) cannot, itself, expand the court's jurisdiction. *See, e.g., Falls Industries, Inc. v. Consolidated Chemical Industries, Inc.*, 258 F.2d 277, 285-86 (5th Cir. 1958); *Bucky v. Sebo*, 207 F.2d 304, 307 n.7 (2d Cir. 1953). But there is not persuasive indication that a Rule 15(b) motion should be

denied simply because it might lead to a jurisdictional defect, so long as the court then proceeds to address that jurisdictional defect as is done here.

The rule provides that issues tried by consent "shall" be treated as if raised in the pleadings. In other words, once a finding of implied consent has been made, the court has no discretion not to treat the pleadings as amended. 6 C. Wright and A. Miller § 1493, at 469. But, even if the matter were discretionary, all pertinent factors would weigh in favor of the amendment.

Therefore, the motion to amend the pleadings is granted.

MOTION TO DISMISS

All three defendants move to dismiss both cases for lack of subject-matter jurisdiction. The two cases are best addressed independently.

Higgins

It is clear that subject matter jurisdiction is lacking as between plaintiff and Celotex since plaintiff has failed to allege or establish diversity. Therefore, as to Celotex, the motion to dismiss must be granted without prejudice, however, to the filing of an amended complaint alleging diversity if, after reasonable inquiry, a factual and legal basis for such an allegation exists.

The lack of diversity between plaintiff and Celotex also impairs jurisdiction over the case as between plaintiff and the other two defendants. The diversity statute has been construed as requiring "complete diversity," that is, the Court will not have jurisdiction over the action if the plaintiff shares citizenship with *any* of the defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806).

> "The presumed theory behind the original grant of diversity jurisdiction in Article III was to provide a neutral, national forum for cases in which there would be a danger of bias in a state court against an out-of-state lit-

> igant. This justification for granting federal diversity jurisdiction does not apply to cases in which there are citizens from the same state on opposing sides of the litigation."

13B C. Wright, A. Miller and E. Cooper § 3605, at 398.

But this finding of lack of complete diversity does not end the inquiry into our jurisdiction over the *Higgins* case. See discussion below of plaintiff's Rule 21 motion.

Johnson

Defendants' only argument for a jurisdictional defect in *Johnson* is that it was consolidated with *Higgins*. Defendants assert that, had it been clear from the start that Celotex was not a proper party to the *Higgins* case, then the Court would not have consolidated *Johnson* and *Higgins*. This assertion may or may not be correct: "although identity of parties strengthens the case for consolidation, it is not required." 9 C. Wright and A. Miller § 2384, at 264.

Regardless of how the Court would have ruled on the consolidation question had all the facts been known, the consolidation ruling is simply irrelevant to our jurisdiction over the *Johnson* case. "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97, 53 S.Ct. 721, 727-28, 77 L.Ed. 1331 (1933); *accord*, *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973). Accordingly, the motion to dismiss the *Johnson* case is denied.

MOTION TO DROP CELOTEX AS DEFENDANT

Plaintiff moves to drop Celotex as a defendant under Rule 21. This device is frequently used for the purpose of preserving diversity, so long as the defendant sought to be dropped is not "indispensable" under Rule 19(b). (Celotex is not

"indispensable" here, as is discussed below.) *See generally* 7 C. Wright, A. Miller, M. Kane § 1685.

But the Second Circuit has indicated that Rule 21 is inappropriate for this purpose and that Rule 15(a) should instead be used. *Kerr v. Compagnie de Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958).

I accordingly apply Rule 15(a). But although Rule 15(a) is the nominal vehicle for a motion to drop a party, the standard to be applied here is not the usual one under Rule 15(a), which gives broad discretion to the court. Instead, "[r]egardless of the procedural vehicle for the motion, unless it appears that a non-diverse defendant cannot be dropped from an action *without prejudice to the remaining defendants*, the motion should be granted and a failure to do so is an abuse of discretion." *Kerr v. Compagnie de Ultramar, supra*, at 864; *accord Samaha v. Presbyterian Hospital*, 757 F.2d 529, 531 (2d Cir. 1985).

Samaha declares that the prejudice referred to is the same kind considered in determining whether a party is "indispensable" under Rule 19(b). 757 F.2d at 531. For that reason, the question of prejudice is addressed below, in connection with the Rule 19 motion.

RULE 19 MOTION

Defendants move for dismissal of the *Higgins* case on the ground that Celotex was an "indispensable" party that could not be joined at trial.

The plain meaning of the opening of section (b) of this Rule is that a case should be dismissed only when a party described in section (a) cannot be joined. "The structure of Rule 19 reflects the analytical sequence that a court should follow in deciding a party joinder problem." 7 C. Wright, A. Miller and M. Kane § 1604, at 40. Here, plaintiffs have not shown that Celotex is a party described in section (a). For this reason, the Rule 19 motion must fail, but Rule 19 still has a bearing here, for, as observed above, its "prejudice"

criterion is material to a decision on the Rule 21/Rule 15(a) motion.

"It is settled federal law that joint tortfeasors are not indispensable parties." *Samaha*, 757 F.2d at 531. This is sensible, because a joint tortfeasor fits neither of the alternatives of Rule 19(a). Complete relief can be had between the parties in his absence, due to joint and several liability; and the joint tortfeasor does not "claim[ ] an interest relating to the subject of the action."

Defendants' arguments on the four factors enumerated in Rule 19(b) are considered below. However, these factors are not the exclusive ones that I take into account; I look also to the facts of each case in light of the "equity and good conscience" test set forth in the rule.

In connection with the rule's "prejudice" factor, Owens-Illinois asserts, without giving any particulars, that in Celotex's absence Owens-Illinois would have been able to use different trial strategies, such as calling different witnesses or developing different theories of medical causation. Owens-Illinois also asserts that in Celotex's absence Owens-Illinois would not have been "painted" with such a "broad brush" by plaintiffs' evidence, and that the Court's limiting instructions were insufficient to counteract that evidence's effect on the jury. And last, Owens-Illinois voices concern over prejudice to Celotex but does not intimate what that prejudice could be.

Prejudice under this portion of the rule is to be evaluated pragmatically rather than with regard to theoretical possibilities. "Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? . . . Would any party be exposed to a fresh action by the absentee, and if so how serious is the threat?" 1966 Advisory Committee Note.

Here, Owens-Illinois' assertions concerning differing trial strategy is general and speculative, and its dissatisfaction with the Court's limiting instructions, conclusory. Moreover, it appears that Celotex's absence from the *Higgins* case would not have affected the bulk of the evidence in the first place,

for all of the evidence of Celotex's knowledge over the years would have remained relevant to the *Johnson* case.

Owens-Illinois argues further that the jury has apportioned liability among several parties including Celotex and that "the Court would have no way of envisioning what verdict the jury would have reached had Celotex not been a defendant in the trial. Any attempt to do so would be a rather straightforward violation of due process."

But there is precedent for "reallocating" proportionate responsibility among defendants, such as a situation in which one of the defendants has filed for bankruptcy after verdict. *See, e.g., Austin v. Raymark Industries, Inc.*, 841 F.2d 1184, 1195-96 (1st Cir.1988). This Court has uncovered no precedent intimating that salvaging a verdict in this way invades the province of the jury or constitutes "prejudice" within the meaning of Rule 19. Indeed, this reallocation affects the jury verdict in a neutral manner, taking Celotex's 10% and distributing it among the other responsible parties in proportion to the fault that the jury found. Thus, the original jury verdict found the three defendants each 10% responsible, Mr. Higgins to have been 10% comparatively negligent, and ten settling co-defendants each 6% responsible. Reallocating Celotex's 10%, Higgins, Owens-Illinois, and Raymark would each be charged with 10/90ths of Celotex's share, and the settling defendants would each be charged with 6/90ths of Celotex's share. The final fault allocation would be as follows:

Higgins	11 and 1/9%
Raymark	11 and 1/9%
Owens-Illinois	11 and 1/9%
Ten settling co-defendants:	6 and 2/3% each
Total . . .	100%

See also Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065 (3rd Cir.1979) (defendant not necessarily indispensable although motion to drop him was brought post-verdict); *Wolgin v. Atlas United Financial Corp.*, 397 F.Supp. 1003 (E.D.Pa.1975) (same when motion was brought after bench trial).

In connection with the rule's "other adequate remedy" factor, defendants argue that plaintiff could sue in the Florida state courts and that she would there have "jurisdiction" over all three defendants. Whether or not this is true need not concern us for purposes of ruling on the Rule 21 or 15(a) motion, for it is only prejudice "to the remaining defendants" that is material. *Kerr v. Compagnie de Ultramar, supra.*

Therefore, the motion to dismiss for failure to join an indispensable party is denied, and the motion to drop Celotex as a defendant is granted. The Court thus retains its diversity jurisdiction over defendants Raymark and Owens-Illinois.

COMPARATIVE NEGLIGENCE

Turning to the first of the motions that does not concern subject matter jurisdiction, plaintiff moves under Rule 50(b) to set aside that portion of the *Higgins* verdict in which the jury found decedent partially responsible for his own injuries, causing a reduction in plaintiff's recovery by 10% or, after the reallocation discussed above, by 11 or 1/9%. Plaintiff asserts that defendant failed to make out a prima facie case (1) that Mr. Higgins' smoking was negligent, or (2) that his smoking was a proximate cause of his injuries.

On the first matter, lack of ordinary care, the evidence showed that Mr. Higgins smoked heavily for 44 years, that he stopped smoking cigarettes in the early 1970's "because of the cancer scare," and that he continued smoking a pipe until 1974. In addition, the Court in its jury charge observed that the U.S. Surgeon General's report on the effects of smoking was issued in 1964.

On the second issue, proximate cause, there was also ample evidence to support the jury's finding. The testimony showed that smoking causes heart disease, bronchitis, and emphysema, and that smoking aggravates the effects of asbestosis. Plaintiffs as the non-moving party here are entitled to the benefit of every legitimate inference that can be drawn from the evidence, *Simblest v. Maynard*, 427 F.2d 1 (2d Cir.1970),

and the case should go to the jury even where there are conflicting inferences to be drawn from the facts. *See, e.g., Onufer v. Seven Springs Farm, Inc.*, 636 F.2d 46, 50 (3d Cir.1980); 9 C. Wright and A. Miller § 2527, at 564.

Therefore, the motion to set aside the contributory negligence verdict is denied.

DETERMINATION OF OWENS-ILLINOIS' SETTLEMENT

The judgment against defendants here is to be reduced by the amount of plaintiff's settlements with former co-defendants, or by the amount of consideration stipulated in plaintiff's release of them, or by the proportion of fault that the jury attributes to them, whichever is greatest. N.Y. General Obligations Law § 15-108(a).

The only settlement that is in dispute is that of Owens-Corning Fiberglas Corp. in the *Higgins* case. Both plaintiff and defendants have agreed to be bound by the amount that Owens-Corning Fiberglas attributed to settlement of the case. In a letter from Michael B. Sena to the Court dated December 30, 1988, counsel for Owens-Corning Fiberglas stated that it had settled the *Higgins* case for $150,000, which is greater than the proportion of fault attributed to that company by the jury.

In none of the other nine instances did the co-defendants in *Higgins* settle for an amount greater than the proportion of fault set in the jury verdict; 6%, or, after reallocation, 6 and 2/3%. Accordingly, the *Higgins* verdict against Raymark and Owens-Illinois will be reduced by nine times 6 and 2/3% (i.e. 60%), plus $150,000.

MOTION FOR MISTRIAL

Defendants also move for a new trial on the ground that plaintiff's counsel made various improper remarks during his closing argument. The remarks complained of fall into three categories: pejorative characterizations of defendants and

their witnesses; references to defendants' wealth and to plaintiff's being relatively less well off; and alleged invocations of the "golden rule" argument. Plaintiff's counsel does not deny having made any of the statements, but asserts that they were permissible parts of his argument. He also notes that his closing and rebuttal took approximately three hours; that defendants objected to none of the remarks at the time, and did not ask the Court for a curative instruction; and that the Court gave its usual charge to the jury concerning deciding the case on the evidence rather than on sympathy or emotion, and also charged that arguments of counsel are not evidence.

"In ruling on a motion for a new trial based on attorney misconduct, the trial court must determine whether counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury. The trial judge has considerable discretion in determining whether a new trial is required." *Strobl v. New York Mercantile Exchange*, 582 F.Supp. 770, 780 (S.D.N.Y.1984); *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir.1978). *See also Milesti v. Long Island R.R. Co.*, 499 F.2d 1169, 1171 (2d Cir.1974) (new trial is needed where improper arguments "depriv[e] the opposite party of a fair trial").

The first group of statements complained of is characterized as "inflammatory" in general. None is so inflammatory as to require a new trial. Particularly in view of the Court's later charges to the jury, "the inflammatory language did not overbear their judgment given the totality of the trial." *Guccione v. Hustler Magazine*, 632 F.Supp. 313, 326 (S.D.N.Y.1986), *rev'd on other grounds*, 800 F.2d 298 (2d Cir.1986).

The second group of statements complained of is that in which reference was made to plaintiffs' and defendants' relative size or financial resources. Such remarks are not per se grounds for a new trial. "Of course, this argument, as excerpted above, would not require reversal if counsel had not gone beyond the brink of rational argument in other aspects." *Draper v. Airco, Inc., supra.* In the context of the summation, as a whole, the Court does not find counsel's remarks here to have created undue passion.

The last group of statements complained of is alleged appeals to the "golden rule" argument. This is an improper type of rhetoric in which counsel asks the jury to award damages in the amount that the jury itself would wish. It applies to damages only and not to liability. *Burrage v. Harrell*, 537 F.2d 837 (5th Cir.1976). It does not bar other uses of the pronoun "you" in an appeal to the jurors' common sense. *Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361, 1366 (2d Cir.1981). This distinction disposes of all but two of the statement of which defendants complain. The remaining two were not of a nature unduly to affect the jury, especially in view of our later charges concerning sympathy, arguments of counsel, and the measure of damages. *Cf. McNamara v. Dionne*, 298 F.2d 352 (2d Cir.1962) (new trial was found unnecessary where trial judge's improper invocation of golden rule argument in pre-trial charge was corrected in final charge and counsel did not object at time of pre-trial charge).

Therefore, the motion for a new trial is denied.

AMOUNT OF JUDGMENT

Applying all of the foregoing to the jury verdict, the Clerk is directed to enter judgment as follows.

In *Higgins*, no recovery may be had against Celotex at this time, and Celotex's 10% proportion of fault should be allocated among the remaining parties as explained above in connection with defendant's Rule 19 motion. Judgment against each of Raymark and Owens-Illinois must therefore be entered for (a) $1,000,000.00 in compensatory damages, less the 60% attributable to nine settling co-defendants and the 11 and 1/9% attributable to Mr. Higgins, and less the $150,000.00 attributable to Owens-Illinois as described above, or $138,888.89; plus (b) $1,000,000.00 in punitive damages.

In *Johnson*, judgment against each of Raymark, Owens-Illinois and Celotex must be entered for (a) $350,000.00 in compensatory damages, less the $245,000.00 attributable to the seven settling co-defendants, for a total of $105,000.00;

plus (b) punitive damages in the amount of $1,000,000.00 against each of Celotex and Raymark, and $800,000.00 against Owens-Illinois.

The Clerk is directed to mail a copy of the within to all parties and to enter judgment as set forth herein in the *Johnson* action. The Clerk is further directed to enter judgment on February 15, 1989, in the *Higgins* action unless plaintiff shall, prior to that date, file an amended complaint alleging diversity jurisdiction against defendant Celotex.

SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 89-7484(L), 89-7542

Filed May 24, 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of May, one thousand nine hundred and ninety.

JOHN E. JOHNSON and h/w ANN MARIE JOHNSON,

Plaintiffs-Appellees,

v.

THE CELOTEX CORPORATION, OWENS-ILLINOIS,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellants THE CELOTEX CORPORATION, OWENS-ILLINOIS

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

TINA EVE BRIER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

89-7484, 89-7542
EDNY 87-civ-0724 SIFTON

Filed March 20, 1990
Issued as mandate: June 6, 1990

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and ninety.

Present:

HON. ROGER J. MINER, C.J.
HON. J. DANIEL MAHONEY, C.J.
HON. GREGORY W. CARMAN, U.S.C.I.T.*
Circuit Judges,

JOHN E. JOHNSON and h/w ANN MARIE JOHNSON,

Plaintiffs-Appellees,

—v.—

THE CELOTEX CORPORATION, OWENS-ILLINOIS, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York.

* Hon. Gregory W. Carman, Judge, for the U.S. Court of International Trade, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellants.

A TRUE COPY
ELAINE B. GOLDSMITH

/s/ ELAINE B. GOLDSMITH
Clerk

ELAINE B. GOLDSMITH,
Clerk

By: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

Federal Rule of Civil Procedure Rule 42

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NYAL CV-87-0724 (SDNY)
Filed February 10, 1989

JOHN E. JOHNSON and ANN MARIE JOHNSON,

Plaintiffs,

—against—

THE CELOTEX CORPORATION *et alia,*

Defendants.

JUDGMENT #84, 0325

Plaintiffs having discontinued this action against defendants AC&S, Inc., Combustion Engineering, Inc., Owens-Corning Fiberglas Corporation and Pittsburgh-Corning Corporation, Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Fibreboard Corporation; and plaintiffs' action against defendant Nicolet, Inc. having been stayed due to defendant's bankruptcy; and a jury having returned a verdict on plaintiffs' claims for personal injury, loss of consortium, and punitive damages, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff John E. Johnson have judgment against defendant Celotex Corporation in the amount of $1,075,000, together with costs, when taxed, and interest at the statutory rate from the date of entry of judgment; and it is hereby further

ORDERED, ADJUDGED AND DECREED that plaintiff John E. Johnson have judgment against defendant Raymark Industries, Inc. in the amount of $1,075,000, together with costs, when taxed, and interest at the statutory rate from the date of entry of judgment; and it is hereby further

ORDERED, ADJUDGED AND DECREED that plaintiff John E. Johnson have judgment against defendant Owens-Illinois, Inc. in the amount of $875,000, together with costs, when taxed, and interest at the statutory rate from the date of entry of judgment; and it is hereby further

ORDERED, ADJUDGED AND DECREED that plaintiff Ann Marie Johnson have judgment against defendants Celotex Corporation, Raymark Industries, Inc., and Owens-Illinois, Inc. in the amount of $30,000, together with costs, when taxed, and interest at the statutory rate from the date of entry of judgment.

The Clerk is directed to mail a copy of the within counsel for defendants Celotex, Raymark and Owens-Illinois and to plaintiffs' counsel who is directed to make distribution forthwith to all parties.

SO ORDERED.

Dated: Brooklyn, New York
February 6, 1989

[ILLEGIBLE]
United States District Judge

ENTER,

CLERK OF THE COURT

By: STANLEY [ILLEGIBLE]
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 2/14/89.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CV-87-0724 (SDNY)

JOHN E. JOHNSON and ANN MARIE JOHNSON,

Plaintiffs,

—against—

THE CELOTEX CORPORATION *et alia*,

Defendants.

AMENDED JUDGMENT

Plaintiffs having discontinued this action against defendants AC&S, Inc., Combustion Engineering, Inc., Owens-Corning Fibreglas Corporation, Pittsburgh-Corning Corporation, Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., and Fibreboard Corporation; and plaintiffs' action against defendant Nicolet, Inc. having been stayed due to defendant's bankruptcy; and a jury having returned a verdict on December 15, 1988, on plaintiffs' claims for personal injury, loss of consortium, and punitive damages, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiff John E. Johnson have judgment against defendant Celotex Corporation in the amount of $1,000,000, together with costs, when taxed, and interest at the state statutory rate from the date of verdict to entry of judgment, and interest at the federal statutory rate from the date of entry of judgment until such judgment is paid; and it is hereby further

ORDERED, ADJUDGED, AND DECREED that plaintiff John E. Johnson have judgment against defendant Raymark Industries, Inc. in the amount of $1,000,000, together with costs, when taxed, and interest at the state statutory rate

from the date of verdict to entry of judgment, and interest at the federal statutory rate from the date of entry of judgment until such judgment is paid; and it is hereby further

ORDERED, ADJUDGED, AND DECREED that plaintiff John E. Johnson have judgment against defendant Owens-Illinois, Inc. in the amount of $800,000, together with costs, when taxed, and interest at the state statutory rate from the date of verdict to entry of judgment, and interest at the federal statutory rate from the date of entry of judgment until such judgment is paid; and it is hereby further

ORDERED, ADJUDGED, AND DECREED that plaintiff John E. Johnson have judgment against defendants Celotex Corporation, Raymark Industries, Inc., and Owens-Illinois, Inc. in the amount of $75,000, together with costs, when taxed, and interest at the state statutory rate from the date of verdict to entry of judgment, and interest at the federal statutory rate from the date of entry of judgment until such judgment is paid; and it is hereby further

ORDERED, ADJUDGED, AND DECREED that plaintiff Ann Marie Johnson have judgment against defendants Celotex Corporation, Raymark Industries, Inc., and Owens-Illinois, Inc. in the amount of $30,000, together with costs, when taxed, and interest at the state statutory rate from the date of verdict to entry of judgment, and interest at the federal statutory rate from the date of entry of judgment until such judgment is paid; and it is hereby further

The Clerk is directed to mail a copy of the within to counsel for defendants Celotex, Raymark, and Owens-Illinois and to plaintiffs' counsel, who is directed to make distribution forthwith to all parties.

SO ORDERED.

Dated: Brooklyn, New York
August 8, 1990

[ILLEGIBLE]
United States District Judge

ENTER,

CLERK OF THE COURT

By: STANLEY [ILLEGIBLE]
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NYAL CV-87-0724 (CPS)
July 11, 1990

JOHN E. JOHNSON and ANN MARIE JOHNSON,

Plaintiffs,

—v.—

THE CELOTEX CORPORATION, OWENS-ILLINOIS, INC.,

Defendants.

PARTIAL SATISFACTION OF JUDGMENT

WHEREAS, judgment was entered on or about February 14, 1989, in the Office of the Clerk of the United States District Court for the Southern District of New York, in the sum of $1,075,000, together with costs and interest, against defendant Celotex Corporation and in favor of the plaintiff John E. Johnson; in the sum of $1,075,000, together with costs and interest, against defendant Raymark Industries, Inc., and in favor of the plaintiff John E. Johnson; in the sum of $875,000, together with costs and interest, against Owens-Illinois, Inc., and in favor of the plaintiff John E. Johnson; and in the sum of $30,000 plus costs and interest, against Owens-Illinois, Inc., Celotex Corporation, and Raymark Industries, jointly and severally, in favor of the plaintiff Ann Marie Johnson (Judgment No. 89,0325);

WHEREAS, said judgment has been partially satisfied by the defendant The Celotex Corporation, in the amount of one million two hundred fifteen thousand six hundred three dollars and forty-one cents ($1,215,603.41) and it is certified that there are no outstanding executions with any sheriff or marshal;

THEREFORE, the Clerk is hereby requested to enter a partial satisfaction of Judgment in the amount of $1,215,603.41.

LEVY, PHILLIPS & KONIGSBERG
Attorneys for Plaintiff

By: STEVEN J. PHILLIPS/kg
Steven J. Phillips

Dated: July 6, 1990

89-7484/7542

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN E. JOHNSON and h/w
ANN MARIE JOHNSON,

Plaintiffs-Appellees,

—v.—

THE CELOTEX CORPORATION, OWENS-ILLINOIS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC FOR DEFENDANTS-APPELLANTS OWENS-ILLINOIS, INC. AND THE CELOTEX CORPORATION

[Andrew T. Berry
Of Counsel]

[Kevin J. Connell
On the Brief]

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TABLE OF CONTENTS

		PAGE
PRELIMINARY STATEMENT		1
STATEMENT OF FACTS AND PROCEDURAL HISTORY		2
ARGUMENT		
POINT I	THE MAJORITY OPINION INCORRECTLY INTERPRETED AND APPLIED NEW YORK LAW IN UPHOLDING AN AWARD OF PUNITIVE DAMAGES BASED UPON NEGLIGENT RATHER THAN RECKLESS CONDUCT	4
POINT II	THE MAJORITY OPINION ERRONEOUSLY APPLIED EVIDENCE OF THE "STATE OF THE ART" SUBSEQUENT TO PLAINTIFF'S LAST EXPOSURE TO ASBESTOS	8
POINT III	IN AFFIRMING THE TRIAL COURT'S CONSOLIDATION ORDER, THE MAJORITY OPINION OVERLOOKED FACTS MILITATING AGAINST CONSOLIDATION AND MISAPPREHENDED DEFENDANTS' ARGUMENTS REGARDING THE PREJUDICE OCCASIONED BY THAT CONSOLIDATION	10
CONCLUSION		15

TABLE OF AUTHORITIES

Cases Cited PAGE

Bolm v. Triumph Corp., 71 A.D.2d 429, 422 N.Y.S.2d 969 (N.Y. Sup. Ct. App. Div. 4th Dept. 1979)..... 1, 13

Johnson v. The Celotex Corporation, No. 87 Civ. 0724 (SDNY).....2, 5, 10, 12

Johnson v. The Celotex Corporation, Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990).....3, 5, 8, 11, 12, 13

Johnson v. The Celotex Corporation, Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990) (Mahoney, J., concurring in part and dissenting in part) 1, 6, 7, 8, 13, 14

Higgins v. Raymark Industries, Inc., No. 87 Civ. 0537 (SDNY).....2, 4, 5, 10, 12

LaBuy v. Howes Leather Co., 352 U.S. 249 (1957)... 12

Leone v. Armstrong World Industries, Inc., No. 88 Civ. 3332 [formerly filed as 87 Civ. 4307] (SDNY). 11

Roginsky v. Richardson-Merrill, Inc., 378 F.2d 843 (2d Cir. 1967)..... 6, 7

Scholz v. Armstrong World Industries, Inc., No. 87 Civ. 4540 (SDNY)..... 11

Court Rules Cited

Fed. R. App. P. 35.....1, 7, 8

Fed. R. App. P. 40 ..... 1, 8

Fed. R. Civ. P. 42(a)..... 2

Other Authorities Cited

Bordens and Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, Judicature, June-July 1989 15

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Wright Miller & Cooper, Federal Practice and Procedure (1977 & Supp. 1990)..... 12

PRELIMINARY STATEMENT

Defendants-appellants The Celotex Corporation ("Celotex") and Owens-Illinois, Inc. ("Owens-Illinois") respectfully petition the Court pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure for rehearing before the panel and rehearing en banc of the decision entered March 20, 1990.

Celotex and Owens-Illinois [hereinafter collectively "the defendants"] respectfully maintain that in upholding an award of punitive damages over Judge Mahoney's dissent,[1] the majority opinion: a) misapprehended the controlling New York law by erroneously employing a negligence rather than recklessness standard for imposition of punitive damages, and b) misapprehended and misapplied "state of the art"[2] principles and overlooked basic facts regarding defendants' conduct which preclude such an award.

Defendants also maintain that the panel's decision overlooked both facts and legal arguments concerning the trial court's prejudicial consolidation of two significantly dissimilar personal injury actions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The appeal at bar arose from the joint trial of two independent "failure to warn" product liability actions, sounding

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1 The Honorable J. Daniel Mahoney filed an opinion which dissented only from "the majority's conclusion that punitive damages are adequately supported by the evidentiary record," and stated that he "would reverse the award of punitive damages as a matter of law." *Johnson v. Celotex*, Docket Nos. 89-7484, 89-7542, slip op. at 1 (opinion entered March 20, 1990) (Mahoney, Circuit Judge, concurring in part and dissenting in part) [hereinafter cited as "Judge Mahoney's opinion at _____"].

2 "State of the art" in products liability cases has been defined as "the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time the product at issue was manufactured." *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 438, n.2, 422 N.Y.S.2d 969 (N.Y. Sup. Ct. App. Div. 4th Dept 1979).

in negligence and strict liability, and involving allegations of personal injury from exposure to asbestos-containing products: *Johnson v. Celotex*, No. 87 Civ. 0724 and *Higgins v. Raymark Industries, Inc.*, No. 87 Civ. 0537. By order of the Honorable Charles P. Sifton, U.S.D.J., the two actions were consolidated under Fed. R. Civ. P. 42(a) shortly before trial over defendant's objections that great prejudice would result from combining the two markedly different cases. Plaintiff Johnson, an "essentially well man"[3] diagnosed in 1985 with a non-impairing lung condition, never personally used asbestos-containing products but claimed "bystander exposure" to such products used by other workers during his three-year employment as an electrician's helper at the Brooklyn Navy Yard from 1942-45.[4] Plaintiff Higgins, on the other hand, died considerably before trial from a more serious asbestos-related lung condition allegedly attributable to his twenty years of bystander exposure while employed as a "chipper and caulker" at the yard from 1946-66. Johnson and Higgins did not know each other personally, and never worked at the huge shipbuilding facility at the same time.[5]

Since plaintiffs' actions sought compensatory and punitive damages for defendants' alleged failure to warn of the health risks posed by their asbestos-containing products, defendants were certain that the substantially dissimilar exposure periods would prejudice defendants' interests since the jury would have to ignore the Higgins' "state of the art" evidence reflecting 20 additional years of scientific advances in evaluating Johnson's claim. See Points II and III *infra* regarding state of the art issues. Defendants were also convinced that defense of the *Johnson* case would be prejudiced by evidence of Higgins' considerably more serious illness and subsequent death. Although defendants made a number of applications

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3 That description was provided by plaintiff Johnson's own medical expert, Dr. Steven Markowitz. Joint Appendix at page 650. [Hereinafter cited as "JA_____"].

4 See majority opinion at 4; 6; 10; 11-12. See also JA10; 11; 13; 15; 19; 37; 39; 737.

5 See majority opinion at 4; 10. See also JA13; 64; 99-101.

intended to reduce the prejudicial effect of the consolidation, all were rejected. *Johnson v. Celotex*, slip op. at 4 (opinion entered March 20, 1990) (Carman, J.,[6] opinion of the Court) [hereinafter cited as "majority opinion at ____"].

Since eight defendants settled and one filed a bankruptcy petition prior to trial, the *Johnson* and *Higgins* cases proceeded to trial against three defendants: Owens-Illinois, Celotex, and Raymark Industries, Inc. ("Raymark"). The jury rendered verdicts in favor of both plaintiffs and awarded Mr. Higgins $1 million in compensatory damages and $3 million in punitive damages which were divided equally between the three defendants. The jury awarded Mr. Johnson $350,000.00 in compensatory damages[7] and $2.8 million in punitive damages assessed as follows: Celotex $1 million, Owens-Illinois $800,000.00 and Raymark $1 million.

Due to post verdict procedural complications apparently defeating diversity jurisdiction as to defendant Celotex in the *Higgins* case,[8] judgment was entered only in favor of plaintiff Johnson, and, following unsuccessful post-trial motions, Celotex and Owens-Illinois filed notices of appeal.

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6 The Honorable Gregory W. Carman, Judge, United States International Court of Trade, sitting by designation.

7 Pursuant to the controlling New York law, the jury apportioned liability between the settling and non-settling defendants resulting in the following percentage allocations: Celotex 12.5%, Owens-Illinois 5.0%, Raymark 12.5%. The remaining 70% of liability was equally allocated among 7 settling defendants. Majority opinion at 5.

8 Following post-trial motions (described in part in the majority's opinion at 5), the district court permitted additional discovery regarding Celotex's principal place of business for purposes of resolving the diversity jurisdiction issue.

ARGUMENT

POINT I

THE MAJORITY OPINION INCORRECTLY INTERPRETED AND APPLIED NEW YORK LAW IN UPHOLDING AN AWARD OF PUNITIVE DAMAGES BASED UPON NEGLIGENT RATHER THAN RECKLESS CONDUCT

Although defendants raised a number of arguments against imposition of punitive damages in the case at bar,[9] the panel reviewed only the question whether legally sufficient evidence was adduced at trial to permit imposition of punitive damages under the controlling New York law. Majority opinion at 17, lines 9-29.

In performing that assessment, the majority recounted in part the district court's proper jury instructions that punitive damages require a finding that defendants' conduct was "wanton and reckless,"[10] but then proceeded to apply an erroneous ordinary negligence standard to sustain the award at bar:

> *A review of the evidence shows that the award of punitive damages was supported by the evidence as a matter of law.* Plaintiff produced evidence at trial through expert witnesses, medical reports and documents from which the jury could reasonably conclude that appellants acted in *a wanton or reckless manner.* For example, plaintiff's expert witness testified that a link between asbestos and lung cancer was suspected as early as 1930

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9 As indicated in the panel's opinion, defendants raised a number of constitutional challenges to the awards of punitive damages which the Court did not reach. Defendants respectfully maintain that the procedural and substantive due process arguments were adequately preserved below and that defendants presented sufficient proofs to demonstrate an unjust result occasioned by multiple imposition of punitive awards with respect to that latter challenge. Moreover, defendants also wish to preserve their rights to raise all their constitutional issues in subsequent proceedings as well as the right to use the awards in the *Johnson* and *Higgins* actions in aid of those arguments.

10 See majority opinion at 18.

> and that this link was considered to be probable shortly after 1940. Another expert witness stated in his deposition that by 1942 there were enough cases of the association between lung cancer and asbestos to include this information in a medical textbook on occupational cancer. A former employee of Owens-Illinois testified that workers at a New Jersey plant, including plant executives, wore respirators in the areas of loose raw material including asbestos. The jury was free to conclude from this and other evidence presented that *appellants knew or should have known of the dangers of asbestos* and did not adequately protect or warn users of asbestos, *thereby acting in a wanton or reckless manner.*

Majority opinion at 18-19 (emphasis supplied). Defendants respectfully maintain that the majority's analysis is patently erroneous. Indeed, the final line of that discussion contradicts itself since negligence is not synonymous with recklessness.

As stated in Judge Mahoney's opinion dissenting from the majority's punitive damages ruling,[11] New York law provides that "[p]unitive damages . . . are not properly chargeable against a defendant who merely 'should have known' of the risk in question. It must be shown that the defendant *was aware of the risk, and that he consciously disregarded it. See Roginsky*, 378 F.2d at 843 (punitive damages proper where manufacturer shown 'to have become aware of danger and to have done nothing, deliberately closing its eyes'). There has been no such showing here." Judge Mahoney's opinion at 3, lines 12-18 (emphasis supplied). "[A] 'should have known' formulation simply does not equate with recklessness under New York Law; actual awareness is required." *Id.* at 4 (citation omitted).

In addressing the punitive damages issue, Judge Mahoney quoted Prosser's formulation of the stringent general com-

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11 "I respectfully dissent, however, from the majority's conclusion that punitive damages are adequately supported by the evidentiary record, and would reverse the award of punitive damages as a matter of law." Judge Mahoney's opinion at 1.

mon law rule requiring "willful or wanton" conduct involving a conscious and deliberate disregard of others' interests,[12] and compared it to the more daunting New York standard for imposition of punitive damages. "As we have said, however, in another diversity case where we undertook a thorough review of the applicable New York precedents, New York law contemplates that 'the recklessness that will give rise to punitive damages must be close to criminality, see 14 N.Y. Jur., Damages § 181 p. 41, and . . . , like criminal conduct, it must be "clearly established." ' "[13]

Defendants respectfully maintain that the majority's misapprehension of the New York law governing award of punitive damages warrants rehearing before the panel or *en banc*. As Judge Mahoney explained, the majority opinion conflicts with this Court's opinion in *Roginsky*, thereby impairing the uniformity of the Second Circuit's body of decisional law. See Fed. R. App. P. 35(a)(1) (*en banc* consideration by court of appeals proper where "necessary to secure or maintain the uniformity of its decisions"). Furthermore, defendants also maintain that the majority's misapprehension of the control-

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12 "[P]unitive damages may be deemed appropriate where a defendant, while not intending to injure a plaintiff, exhibits 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.' " Judge Mahoney's opinion at 1-2 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 2, at 9 (5th ed. 1984)).

13 Judge Mahoney's opinion at 2 (quoting *Roginsky v. Richarson-Merrill, Inc.*, 378 F.2d 843 (2d Cir. 1967)).

Judge Mahoney further noted that *Roginsky* "went on to quote . . . the definition in N.Y. Penal Law § 15.05(3) (McKinney 1987), since unchanged, as setting forth New York's view of recklessness. Section 15.05(3) provides in pertinent part:

> A person acts recklessly with respect to a result . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur . . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

I do not regard the evidence in this case as adequate for submission of punitive damages to the jury under these standards." Judge Mahoney's opinion at 2.

ling New York law presents a question of "exceptional importance" warranting *en banc* review under Fed. R. App. P. 35(a)(2). The New York district courts and this Court are now grappling with a torrent of asbestos (and other tort) actions which invariably include punitive damage claims. See majority opinion at 3. A seriously erroneous expression of New York punitive damage law from this Court will promote confusion and delay, and prove an added burden to litigants and the district judges. At the very least, rehearing by the panel under Fed. R. App. P. 40 would provide an opportunity to correct a flawed precedent.

POINT II

THE MAJORITY OPINION ERRONEOUSLY APPLIED EVIDENCE OF THE "STATE OF THE ART" SUBSEQUENT TO PLAINTIFF'S LAST EXPOSURE TO ASBESTOS

The majority opinion not only misapprehended the New York punitive damage standard, it also misapprehended and misapplied "state of the art" legal principles and overlooked facts which preclude imposition of punitive damages in the case at bar.

The majority made an error easy to make and one all too common in "failure to warn" toxic tort actions. The majority erroneously assumed that once an asbestos-product manufacturer had knowledge that asbestos could cause a particular ailment (e.g., asbestosis) under a particular set of exposure circumstances (e.g., the use of raw asbestos fiber by factory workers manufacturing insulation products) it also necessarily had knowledge "of all other dangers of asbestos." See Judge Mahoney's opinion at 3, line 18 to 4, line 12. As Judge Mahoney points out, plaintiff Johnson's punitive damages evidence regarding the corporate defendants' knowledge of the dangers of asbestos consisted of references to medical literature and corporate communications indicating that as of the mid 1940s there was information that workers in asbestos-processing plants who experienced "direct and sus-

tained exposure to high concentration levels of asbestos fibers" could be harmed thereby. See Judge Mahoney's opinion at 3. "There was, however, *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s [the time of plaintiff Johnson's last exposure to asbestos] information establishing, or even predicting, that 'bystanders' [like Johnson who did not personally use raw fiber or even finished asbestos products] might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use. The award of punitive damages is, therefore, in my view unsustainable." *Id.* at 3-4 (emphasis in original). This is so because under New York law punitive damages "are not properly chargeable against a defendant who merely 'should have known' of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it." *Id.* at 3.

Since there was no evidence below that the asbestos-product manufacturers at bar did have *actual* knowledge in the mid 1940s that plaintiff Johnson's "bystander" exposure to finished asbestos-containing products could result in his specific ailment, asbestos-related pleural disease,[14] his award of punitive damages is improper under New York law.

Defendants respectfully maintain that refusing to overturn the punitive awards in the case at bar would work an injustice on defendants Owens-Illinois and Celotex and also burden future courts with a flawed precedent which not only misstates New York law, but also provides a confused application of that law likely to be repeated in numerous "failure to warn" toxic tort cases.

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14 In their brief to the panel, plaintiffs stated that Mr. Johnson had "asbestosis," a more serious condition, but, as pointed out in defendant Celotex reply brief at page 3, his own expert physician was unwilling to characterize the ailment as "asbestosis," and chose a middle ground by using the term "asbestosis related pleural disease." See Joint Appendix at JA715.

POINT III

IN AFFIRMING THE TRIAL COURT'S CONSOLIDATION ORDER, THE MAJORITY OPINION OVERLOOKED FACTS MILITATING AGAINST CONSOLIDATION AND MISAPPREHENDED DEFENDANTS' ARGUMENTS REGARDING THE PREJUDICE OCCASIONED BY THAT CONSOLIDATION

Defendants respectfully maintain that in affirming the district court's consolidation of the *Johnson* and *Higgins* actions, the panel overlooked facts and legal arguments militating against consolidation. Moreover, by affirming the consolidation of those significantly dissimilar cases, the panel has created a precedent which will, and indeed already has,[15] encouraged the district courts to consolidate actions with only a few common factors, even where the risks of jury confusion and prejudice (i.e., decision on an improper basis) are great. While unfortunate language in an opinion affirming consolidation in a routine, isolated product liability action may not present a compelling case for rehearing, such language in an opinion which will affect consolidation of thousands of asbestos cases does require additional review, even if only by the panel which affirmed the consolidation. See majority opinion at 3 (regarding "unparalleled" scope of asbestos litigation).

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15 On March 29, 1990, the Hon. John E. Sprizzo, U.S.D.J., expressly relying on the panel's opinion in *Johnson*, departed from his initial plan to separate asbestos cases involving cancer claims from those alleging less serious asbestos-related diseases, and ordered a consolidated trial of twenty asbestos actions. The twenty consist of 14 asbestosis and pleural disease claims, and 6 cancer claims, including one involving the deadly disease mesothelioma. Two of the 20 consolidated actions are: *Leone v. Armstrong World Industries, Inc.*, No. 88 Civ. 3332 [formerly filed as 87 Civ. 4307] (SDNY) (asbestosis claim); *Scholz v. Armstrong World Industries, Inc.*, No. 87 Civ. 4540 (SDNY) (mesothelioma claim). In ordering that consolidation, Judge Sprizzo referred to the wide discretion accorded him by *Johnson* Court and stated that any prejudice to defendants would be cured by proper jury instructions. Since a transcript is not yet available, defendants are wiling to submit an affidavit regarding this matter if the Court deems it necessary.

Indeed, since the district courts have thousands of pending asbestos cases to choose from in making consolidation decisions, there is absolutely no need to prejudice defense of asbestos cases by combining even moderately—much less markedly—dissimilar actions in order to achieve judicial economy. Defendants respectfully maintain that this Court should exercise its authority to rehear the consolidation issue and establish precedential guidelines requiring a much closer "match" between asbestos cases consolidated for trial than the district court employed in the case at bar.[16]

Even if the case at bar did not arise from the massive asbestos docket which will be adversely affected by an erroneous precedent, it would still warrant rehearing on the consolidation issue because its trial was an unfair proceeding, and its verdict is demonstrably the result of prejudice and confusion.

As mentioned briefly above, Judge Sifton, over defendants' objections, consolidated the *Johnson* and *Higgins* actions for trial. Defendants objected to the consolidation because although the actions were superficially similar in sev-

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16 Defendants respectfully suggest that guidance from this Court encouraging consolidation of only those asbestos cases with numerous common factors—or at least those with no differences as to especially significant factors—would help eliminate jury confusion and prejudice to defendants. Indeed, although the panel purported to utilize an eight-factor trial consolidation test contained in an unreported Maryland district court opinion, it upheld the consolidation of *Johnson* and *Higgins* despite the fact that the two actions differed as to 3 of the most crucial elements of that test: (3) period of exposure, (4) type of disease, (5) whether plaintiffs were living or deceased. Defendants respectfully maintain that the district court gave undue weight to the factor least important from the standpoint of avoiding decision on an improper basis: (6) both *Johnson* and *Higgins* were ready for trial at the same time.

The United States Supreme Court has expressly approved of "supervisory control of the District Courts by the Courts of Appeals" in mandamus proceedings. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). For a discussion of the courts of appeals' power to supervise the administration of justice in the federal district courts by supervisory and advisory mandamus, see 16 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction at § 3934 (1977 & Supp. 1990).

eral respects, they were fundamentally different in ways which precluded a fair consolidated trial.

Although Johnson and Higgins both worked at the Brooklyn Navy Yard, a huge facility,[17] they did not do so during the same period. That difference, as well as the vastly different duration of their respective employments proved an insurmountable obstacle in a case where "state of the art" evidence was crucial. Johnson worked at the yard as an electrician's helper from 1942-45—3 years; Higgins worked as a "chipper and caulker" from 1946-66—20 years. Since Johnson was not exposed to asbestos-containing products after leaving the yard,[18] the jury should not have heard post-1945 "state of the art" evidence. Or, to put it in other terms, the jury should have heard evidence of only those asbestos risks known to the scientific and industrial community prior to 1945. But, unfortunately, due to the consolidation and denial of defendant's motion precluding introduction of post-1945 state of the art evidence,[19] the jury was permitted to hear evidence pertaining to the advances in medical, scientific and industrial knowledge achieved during the subsequent 20 year period when Mr. Higgins was employed. It was only during this latter period that the "state of the art" began to include information that "bystander" asbestos exposure like that experienced by plaintiff Johnson could cause his type of pulmonary injury. See Judge Mahoney's opinion at 3-4 ("This record contains no evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that 'bystanders' might

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17 Mr. Johnson described the Brooklyn Navy Yard as having approximately 100,000 employees, and covering an area about three miles long and one-half mile wide. See Joint Appendix at JA10; JA377-378. See also JA383.

18 See majority opinion at 6, line 22-23.

19 The majority opinion incorrectly states that defendants moved "to preclude all evidence of knowledge post-1945 in relation to plaintiff Johnson. . . ." Majority opinion at 4, lines 19-21. Defendants actually moved to completely preclude introduction of that evidence (JA1783, JA1784, line 19). At trial and in their appeal to this Court, defendants maintained that the introduction of plaintiff Higgins' post-1945 evidence prejudiced defense of the Johnson claim.

experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use").

Defendants maintain that the failure of the jury to consider Mr. Johnson's and Mr. Higgins' claims separately despite the trial court's instructions is demonstrated by the fact that the jury found a similar duty to warn as to both plaintiffs,[20] and, more significantly, awarded the plaintiffs almost identical punitive damages ($3 million for Higgins and $2.8 million for Johnson). Since Mr. Higgins' punitive claim was predicated upon 20 additional years of purported inaction in the face of a duty to warn, it is impossible to believe that the jury did not apply Higgins' proofs to Johnson's claim.

While the consolidation was most obviously prejudicial with respect to the state of the art evidence, prejudice also appears in the fact that the jury compensating Johnson, an "essentially well man,"[21] also heard—and was improperly swayed by—evidence of Higgins' slow death from serious

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20 In holding defendants liable to both plaintiffs, the jury necessarily found a duty to warn existed during both Mr. Johnson's and Mr. Higgins' periods of employment. A defendant's duty to warn arises, if at all, at the time of plaintiff's exposure. *See, e.g., Bolm v. Triumph Corp.*, 71 A.D.2d 429, 438, n.2, 422 N.Y.S.2d 969 (N.Y. Sup. Ct. App. Div. 4th Dept. 1979). Yet, as Judge Mahoney noted, there was no evidence in the mid 1940s that the state of the art for asbestos included information that 'bystanders' in shipyards were at risk. See Mahoney dissent at 3, line 22 to 4, line 2. While he would reverse the award of punitive damages, Judge Mahoney upheld the compensatory award on the theory that during the time of Johnson's exposure, "appellants were aware that the properties of asbestos were such that it could, at some level of exposure, injure a human being." Mahoney dissent at 2-3. Defendants respectfully maintain that such generalized information is insufficient to support even an award of compensatory damages.

21 Mr. Johnson was so described by his own medical expert. JA650. A recent empirical study supports the proposition that consolidating a severely injured plaintiff's trial with that of a plaintiff less severely injured tends to result in overcompensation of the latter. Bordens and Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, Judicature, June-July, 1989 at 23.

lung disease in graphic detail through the testimony of his widow and son.[22]

CONCLUSION

For all the foregoing reasons, as well as those set forth in Judge Mahoney's dissent, rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

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Attorneys for Defendants-Appellants
The Celotex Corporation and
Owens-Illinois, Inc.

By: _____
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Dated: April 3, 1990

---

22 They related his difficulties in breathing; how he brought a portable oxygen unit to church with him (JA95); how he could not sleep normally and was compelled to sit upright through the night dependent upon a nearby oxygen unit (JA71-72); how his lips and fingernails turned purple, and his feet swelled (JA98); and how he finally suffocated to death (JA99-101).

No. 90-339 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,

Petitioner,

—v.—

JOHN E. JOHNSON, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where agreed upon and unobjected to New York legal standards form the basis for a punitive damage judgment, thereby leaving no legal issue, constitutional or otherwise, for this Court to review, should this Court consider the evidentiary sufficiency of plaintiffs' proofs, which, in any event, were ample, and which have already been passed upon by the jury, the trial court, and the Second Circuit?

2. Should this Court review the Second Circuit's holding that the trial court properly exercised its discretion in consolidating this case with another, essentially similar, asbestos product liability action, involving the same workplace, the same manner of injury, the same disease, and the same defendants, particularly where the jury was repeatedly cautioned to, and did, consider each case individually?

TABLE OF CONTENTS

		Page
STATEMENT OF THE CASE		i
TABLE OF AUTHORITIES		ii
REASONS FOR DENYING THE WRIT		
I	THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE SUFFICIENCY OF THE EVIDENCE SUPPORTING THE PUNITIVE DAMAGE AWARD, WHICH WAS PROPERLY UPHELD BY THE SECOND CIRCUIT IN ACCORDANCE WITH AGREED UPON NEW YORK LEGAL STANDARDS	11
II	THE SECOND CIRCUIT'S AFFIRMANCE OF THE CONSOLIDATION FOR TRIAL OF TWO ESSENTIALLY SIMILAR ACTIONS WAS ENTIRELY PROPER, AND IN NO WAY WARRANTS REVIEW BY THIS COURT	20
CONCLUSION		25

TABLE OF AUTHORITIES

Page(s)

Cases:

Arnold v. Eastern Airlines, Inc., 681 F.2d 186 (4th Cir. 1982) cert den., 460 U.S. 1102 (1983) . . . 22

Cleghorn v. New York C. & H. R.R. Co., 56 N.Y. 44 (1874) 13

Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985) 22

Johnson v. Celotex Corp., Nos. 89-7484 and 89-7542, slip op. (2d Cir. 1990) . . . . . 1, passim

Soucy v. Greyhound Corp., 27 App.Div.2d 112 (3d Dep't 1967) 13

Statutes:

Toxic Tort Revival Statute, 1986 N.Y. Laws, ch. 682 § 420 21

Rules:

Fed.R.Civ.P. 42(a) 22

STATEMENT OF THE CASE

Rarely will this Court encounter a matter less deserving of its review than this. For, stripped of its rhetoric, petitioner The Celotex Corporation ["Celotex"] asks this Court to do little else than rule upon the sufficiency of the evidence in support of the jury verdict in this single personal injury action. There is no issue of "controlling" state law. There is no issue of substantive federal law. Stated bluntly, review herein can have absolutely no precedential value to any other case, and would constitute a waste of this Court's resources.

Needless to state, the Second Circuit Court of Appeals and the trial judge below have each in turn affirmed the jury's verdict, and with ample legal and evidentiary basis. John Johnson, at age 65, was diagnosed with asbestosis and severe pleural thickening -- irreversible and progressively disabling lung disorders caused solely by exposure to asbestos.[1]

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[1] E.g., Joint Appendix in Johnson v. (continued...)

At trial, the overwhelming and largely uncontradicted evidence established not only the serious nature of Mr. Johnson's injuries,[2] but

[1](...continued)
Celotex Corp., Nos. 89-7484 and 89-7542 (2d Cir. 1990) at 521-522; 659; 719. Hereafter, references to the Joint Appendix will be stated as "J___."

[2] Petitioner's repeated suggestions to this Court that Mr. Johnson was not injured or ill were, of course, rejected by the jury, and contrary to the evidence. Mr. Johnson was not only diagnosed by his own treating physicians as having asbestosis, but petitioner's expert pulmonologist, Dr. Kamelhar, concluded that plaintiff had classic symptoms of asbestosis: increased parenchymal markings bilaterally [J915-916], extensive pleural calcifications on x-ray [J914-915]; and rales, or crackling sounds on auscultation [J916-917]. Medical testimony further established that Mr. Johnson is at an enhanced risk for developing cancer [J677-679, J705-707], and, accordingly, requires medical surveillance on an ongoing basis against this danger [J710]. Indeed, Mr. Johnson's treating doctors initially read his x-rays as showing a probable cancer, and so advised him. He accordingly submitted to a broncoscopy, which revealed precancerous squamous cells [J680]. Also revealed by biopsy was "septal fibrosis," a positive finding for asbestosis [J712-713].

Needless to add, Mr. Johnson described how his shortness of breath was becoming more pronounced with the passage of time [J38-39], and his wife described how he now tired with increasing frequency [J55]. In short, the jury was presented with ample evidence to permit it

(continued...)

also that a proximate cause of these injuries was Mr. Johnson's repeated exposure, while employed at the Brooklyn Navy Yard during World War II, to asbestos dust from products manufactured by Celotex's predecessor, the Philip Carey Company ["Carey"].[3]

More significantly for the purposes of this Petition, the proofs soundly established that Carey had, indeed, actual and concrete knowledge of the deadly characteristics of its asbestos product before and during the time Mr. Johnson was exposed. At trial Dr. Robert Ritterhoff, a well qualified pathologist, testified that in 1944 he performed an autopsy on a Carey worker, and concluded that the man's

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[2](...continued)
to conclude that Mr. Johnson has a significant asbestos caused disease, that he has suffered and still suffers serious physical disabilities, and that his condition is deteriorating.

[3] Appendix to Petition for Writ of Certiorari at 37a-40a. Hereinafter, citation to this Appendix shall be stated as: "Pet. App. ___."

death was due to asbestos.[4] At that time, Dr. Ritterhoff specifically warned Carey, through an appropriate corporate official, of his findings.[5]

Thus, although petitioner fails to reveal this crucial fact to the Court, the jury had before it explicit evidence that Carey actually knew of the dangers of its product by 1944. The premise at the heart of the Petition -- that the punitive damage verdict was based solely on so-called "state of the art" evidence -- is factually incorrect.

To be sure, compelling proofs further established that long before World War II, indeed by no later than 1930, it was universally known in industrial and medical circles that asbestos produced, after long latency

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[4] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

[5] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

periods, fatal or crippling lung diseases.[6] All

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[6] See, e.g., Pet. App. 44a. Indeed, evidence revealed that by as early as 1900 reports of asbestos-generated respiratory diseases were convincingly reported by Dr. Montague Murray, the Chief Inspector of Factories in the United Kingdom and had become the subject of Parliamentary concern [J1085-1088]. Moreover, as the uncontradicted proofs demonstrated, the medical literature grew year by year to a point where, by 1930, the full scale and exhaustive epidemiological studies of a Dr. Merewether conclusively established and widely publicized that asbestos dust in industrial settings produced asbestosis [J1191-1192, J1085]. Equally well established from this time onward was the insidious and vicious nature of this incurable, untreatable disease, which because of the long latency period between exposure and manifestation, did not become manifest or symptomatic until many years after exposure commenced [E.g., J1114-1115].

After 1930 there was continuing medical publicity concerning asbestos hazards from no less authorities than the United States Public Health Service (1938) [J1259, J1263-1269], the International Labor Organization and the United States Navy, which specifically recognized in a 1940 publication that asbestos was a potential occupational hazard for shipyard workers [J2625, J2634]. In this connection, petitioner's contention that in the World War II years there was no "state of the art" evidence that finished asbestos insulation products caused injury to shipyard workers is misplaced.

As if the foregoing awareness of the hazards of asbestos was not itself sufficient, the proofs also revealed that long before John Johnson's first exposure to asbestos dust in

(continued...)

told, the evidence richly supported a finding that Carey, secure in the knowledge that the human suffering that would result from its asbestos products would not become manifest for decades, recklessly and wantonly failed to warn workingmen like Mr. Johnson of these hazards.

Not surprisingly, the jury returned a verdict in respondents' favor, and rendered a compensatory damage award of $350,000.00 [$250,000.00 for Mr. Johnson on his personal injury claims, and $100,000.00 for Mrs. Johnson on her derivative claim for loss of consortium]

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[6](...continued)
1942, the carcinogenic nature of this dust was also well described and widely understood. The carcinogenic nature of asbestos had been reported as early as 1935 in leading medical journals [J1089]. Indeed, by 1942 this cancer link was so widely accepted that it had found its way into the basic medical textbooks on chest diseases, and was taught as basic medicine to medical students [J1089-1090]. Finally, Dr. Margaret Becklake, conceded by even defense experts to be a foremost epidemiologist and epidemiological historian addressing this subject [J1301], concluded that the link between asbestos exposure and cancer, which was first suspected no later than 1935, had been established as being probable no later than 1940 [J1304].

Pet. App. 32a. Moreover, having been carefully instructed by the trial judge, in accordance with well established New York law, that punitive damages must be based upon "wanton and reckless" misconduct, and determined by "clear and convincing" evidence, Pet. App. 44a, the jury returned a punitive damage award against Carey in the sum of $1,000,000.00. Pet. App. 32a.

Now, following the trial judge's denial of all post trial motions, and the Second Circuit's affirmance of the judgment in all respects, petitioner asks this Court to grant certiorari, claiming:

1. that the Second Circuit somehow misapplied New York law by permitting punitive damages to be based upon negligent [as opposed to reckless or intentional] misconduct, and "state of the art" evidence [as opposed to evidence that Celotex actually knew of the dangers of asbestos]; and

2. that the trial court somehow improvidently exercised its discretion in consolidating this case with that of another asbestos victim, John Higgins, where both cases involved the same disease; involved individuals who were injured in the same fashion, at the same worksite; had common defendants, and the same attorneys; were fully prepared and had been clustered together pursuant to a case management order; and where the jury was repeatedly cautioned to consider each plaintiff's case separately. Pet. App. 36a-37a.

Not only are these contentions each misguided, but as will be developed below, they are clearly unworthy of this Court's attention.

First of all, lest there be no confusion, petitioner concedes that the trial judge properly charged the jury concerning the legal standards for the award of punitive damages. Petition at 8. Indeed, no objection was raised at trial, post-trial, or on appeal that this

charge was in any way at odds with New York law. Pet. App. 44a.

Under these circumstances, it is disingenuous at best for petitioner, in an attempt to engage this Court's attention, to cast its argument in the guise of claimed abrogations of "controlling New York law." For the purposes of this case, there is no question but that the jury's verdict was predicated on the appropriate legal standards.

Upon scrutiny, petitioner's argument boils down to one of fact -- that the punitive damage award was somehow not supported by the evidence. To that end, petitioner makes much of the Second Circuit's deletion of a phrase from its original opinion. As will be developed below, however, the circuit court quite properly found the evidence sufficient to support the verdict under the law as charged. For, even assuming arguendo that a punitive damage award requires proof of intentional misconduct, the testimony of Dr. Ritterhoff established

that Carey, in fact, knew of the dangers of its product when it failed to warn Mr. Johnson.

Of course, the circuit court's cosmetic editing of its opinion did not alter its holding one iota, and is in itself no basis to invoke the review of this Court in a matter so mundane as judicial review of the sufficiency of evidence in a single personal injury action.

Turning to petitioner's remaining contention, it need hardly be stated that the consolidation of two essentially similar cases for trial is a sound and proper exercise of a trial court's discretion, as the circuit court properly held. Pet. App. 37a.

For the reasons to be developed more fully below, this writ should be denied.

REASONS FOR DENYING THE WRIT

I

THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE SUFFICIENCY OF THE EVIDENCE SUPPORTING THE PUNITIVE DAMAGE AWARD, WHICH WAS PROPERLY UPHELD BY THE SECOND CIRCUIT IN ACCORDANCE WITH AGREED UPON NEW YORK LEGAL STANDARDS

In asking this Court to review or to vacate the jury's punitive damage award, Celotex attempts to fashion an argument that the Second Circuit somehow "misapprehended and misapplied the controlling New York law." Petition at i, 8, 17. It could not be clearer, however, that the Second Circuit invoked precisely the legal standard for punitive damages which was articulated by the trial judge, and unobjected to by petitioner at trial, on appeal, or indeed, in this very proceeding. See Petition at 8.

The circuit court's opinion reads, in unequivocal terms:

> [T]he trial judge informed the jury in his charge that punitive damages may be awarded if plaintiffs "clearly and convincingly established that the acts of a defendant [the jury was] considering causing the injury you [sic] complained of were wanton and

> reckless." Joint Appendix at 2123. An act was defined as wanton and reckless when "done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the results upon the rights and safety of others that may flow from doing the act, or in the manner in which it is done." Id. at 2124. No claim has been made by appellants that this charge was not in accordance with New York law.

Pet. App. 44a. (Emphasis supplied.)

Having thus set forth the applicable legal principles, the Second Circuit undertook a review of the evidence and held "that the award of punitive damages was supported by the evidence as a matter of law." Pet. App. 44a. In so doing, the circuit court quite properly made reference to certain of plaintiff's proofs, and determined that:

> The jury was free to consider from this and other evidence presented that appellants knew of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner.

Pet. App. 44a. (Emphasis supplied.)

Without doubt, then, the Second Circuit measured the evidence against the appropriate -- indeed, the conceded -- legal yardstick, and petitioner's assertion that the court "misapprehended New York law" is nothing short of specious.

Equally specious is the argument that the Second Circuit's editing of the phrase "should have known" from its original draft of the last quoted paragraph alters in any way the soundness of the result reached. For, even assuming for the purposes of this argument that the "should have known" formulation, taken alone, would be no basis for punitive damages,[7] the

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[7] Respondents do not concede that gross negligence alone is an insufficient basis for punitive damages, as there are, indeed, New York authorities to this effect. See, e.g., Soucy v. Greyhound Corp., 27 App.Div.2d 112 (3d Dep't 1967); Cleghorn v. New York C. & H. R.R. Co., 56 N.Y. 44 (1874). Be that as it may, the question of New York's legal prerequisite for the imposition of punitive damages is not a subject for consideration by this Court, since the trial judge's more stringent "wanton and reckless" charge, which was unobjected to at every stage of this action, is the law of the case, and the basis upon which the jury rendered its verdict.

fact remains that the circuit court had before it compelling evidence that Celotex, in fact, knew of the hazards of asbestos in 1944, at a time when John Johnson and other unsuspecting workingmen were inhaling its deadly asbestos fibers at the Brooklyn Navy Yard.

At trial, Dr. Robert Rittenhoff, a well qualified pathologist, gave testimony that in 1944, on autopsying a Carey employee, he concluded that the cause of death was inhalation of asbestos fibers.[8] More importantly, according to this witness, he was so impressed by this finding that he took the trouble to travel to a Carey facility and so inform an appropriate Carey corporate representative.[9]

Thus, Celotex had actual and concrete knowledge of the hazards of asbestos during the

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[8] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

[9] Testimony of Dr. Robert Ritterhoff, see Stipulation and Order Supplementing the Joint Appendix, Appendix V, Exhibit R, at 25-47.

period of Mr. Johnson's exposure. Accordingly, even setting aside the compelling "state of the art" proofs, Dr. Ritterhoff's testimony was more than sufficient to support a finding that Celotex actually knew of the dangers of its product, such that its failure to warn Mr. Johnson was reckless and wanton under the law as charged. Under these circumstances, the circuit court's editing of the "should have known" phrase was of absolutely no moment.

In its Petition, Celotex purports to read the circuit judges' minds, asserting that the majority "did not consider what Celotex actually knew." Petition at 13. That petitioner chooses to ignore the proofs of its actual knowledge, and fails even to bring this crucial evidence to the attention of this Court, is certainly no reason to suppose that the Second Circuit was not cognizant of the complete evidentiary record. Respondents most certainly presented these proofs quite pointedly to the circuit court in their brief.

Apparently, Celotex takes the absurd view that in its opinion upholding the sufficiency of the evidence the circuit court was required to list and describe every single shred of proof that tended to support the verdict. In this case particularly, given the enormous wealth of evidence documenting the misconduct of Celotex and its codefendant, see, e.g., footnote 6, supra, such an all-inclusive recounting of the proofs would hardly have been practicable, and certainly was not required.

To be sure, the circuit court, after citing to certain salient aspects of the evidence, made explicit reference to "other evidence presented" as further basis for sustaining the verdict. Pet. App. 44a. Undoubtedly, this "other evidence" included the testimony regarding Celotex's actual knowledge of the hazards of its product.

Lest there by any doubt in the matter, even apart from Celotex's actual knowledge, the devastating state of the art proofs were more

than ample to permit a jury to conclude either that petitioner, as an expert,[10] must have known of these open and notorious dangers, and that protestations to the contrary are incredible and not worthy of belief -- or alternatively, that Celotex's failure to have learned of these obvious hazards was itself an ostrich-like act of considerable recklessness and depravity.

Nor is there any merit to petitioner's argument that Mr. Johnson's status as a shipyard worker, as opposed to a plantworker, somehow makes the verdict unsustainable as a matter of law. First of all, there was, indeed, "state of the art" evidence presented which documented a recognition by at least 1940 -- two years before Mr. Johnson began to work at the Brooklyn Navy Yard -- that asbestos was a

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[10] By the time of Mr. Johnson's exposure, Carey had been in the asbestos business for decades, having first entered the field in 1906. Moreover, Carey was a large industrial concern endowed with the usual coterie of physicians, industrial hygienists and the like [e.g. J1651 et seq.; J1507 et seq.]

potential hazard for shipyard workers. [E.g., J2625, J2634]. Petitioner's repeated assertion to the contrary is factually in error.

But more to the point, especially in light of the evidence of Celotex's actual knowledge, by 1944, that inhaled asbestos could result in death, it was altogether reasonable for the jury to conclude that Celotex had a duty [which it recklessly breached], at least by 1944, to warn all persons who might possibly come into contact with the deadly fibers. As the Second Circuit, no doubt, concluded in upholding the punitive damage award, it hardly requires absolute certainty of harm to trigger the duty to warn of a known or even suspected hazard. Indeed, the trial judge correctly instructed the jury, again without objection from petitioner, that:

> [t]he greater the <u>potential</u> hazard of the product of which the manufacturer knew or reasonably should have known, the more extensive must the manufacturer's efforts be to avoid injury by making that hazard

> known to the reasonably foreseeable users.

[J2106]. (Emphasis supplied).

Thus, the jury was free to conclude that the duty to warn, especially given the terrible potential consequences of asbestos-related disease, was triggered as soon as the possibility, let alone the probability, of these cause and effect relationships became known. Here once again, it was entirely reasonable for the jury to determine, as a factual matter, that Celotex's failure to warn was reckless, wanton, or depraved.

In the final analysis, what Petitioner seeks is to have this Court review *de novo* the sufficiency of the evidence to support the punitive damage award in this single personal injury action. Such an undertaking would have absolutely no precedential value, since every action must, of course, rest on its individual evidentiary record. Nor does the petition present any legal issue at all, let alone one

that might merit this Court's attention. Accordingly, this writ should be denied.

II

THE SECOND CIRCUIT'S AFFIRMANCE OF THE CONSOLIDATION FOR TRIAL OF TWO ESSENTIALLY SIMILAR ACTIONS WAS ENTIRELY PROPER, AND IN NO WAY WARRANTS REVIEW BY THIS COURT

The Second Circuit panel was unanimous in upholding the consolidation of the Johnson matter with that of John Higgins, and with good reason. From a factual perspective, the logic of consolidating these two cases was unassailable. Both cases involved the same worksite (the Brooklyn Navy Yard), the same defendants, the same disease (asbestosis), and the same work status as "bystanders" who did not directly handle asbestos products but worked side by side with those who did. Pet. App. 36a-37a. Accordingly, as the trial record richly

reveals, the great bulk of the proofs were commonly relevant to both cases.[11]

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[11] It is well to note that the passage of New York's one-year revival statute for asbestos-related (and certain other) toxic torts, 1986 N.Y. Laws, ch. 682 § 4, produced "unparalleled litigation," Pet. App., 30a-31a, resulting in severe problems of docket control. To manage this deluge of cases, all actions filed in the Southern and Eastern Districts were assigned to Judge Charles P. Sifton for pretrial proceedings. Judge Sifton, who presided over the Johnson/Higgins trial, and was from experience fully knowledgeable of the nature of the Brooklyn Navy Yard proofs, expressed his reasons for ordering the consolidation as follows:

> It seems to me that they are appropriately consolidated, and I'll direct that they go forward together.
>
> It seems to me that the potential confusion is much less than one might suppose before having experience with the trial of some of these cases arising out of the Navy Yard. The significance of the common work site does seem to me quite telling, that in that they both arise out of a common work space and environment.
>
> * * *
>
> I think it's also worthy to note that these are but two of some 25 cases in which both plaintiffs and defendants undertook to be trial ready in the month of November, principally because of the last minute

(continued...)

In disposing of petitioner's objections to the consolidation of these cases, the Second Circuit reviewed the wealth of legal authority which accords a trial judge, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, broad discretion to determine whether consolidation is appropriate.[12] Pet. App. 34a-36a.

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[11](...continued)
settlement posture that everyone seems to have been assuming.

> The Court in this district and the Southern District are being thoroughly taxed. Some considerations of efficiency are very important. Discovery is completed. I have the pretrial submissions in both cases and I've had them for a period of time.
>
> * * *
>
> There are as I note a considerable number of common factual and legal issues. The matter of trial time is extraordinarily important and, accordingly, I'll direct that the two cases be consolidated for trial. [J1768-J1770].

[12] E.g., Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985); Arnold v. Eastern Airlines, Inc., 681 F.2d 186 (4th Cir. 1982) cert den., 460 U.S. 1102 (1983).

The circuit court went on to note that absent "a clear abuse of discretion" the trial judge's decision to consolidate may not be disturbed on appeal. Pet. App. 37a. Petitioner does not dispute these well settled legal authorities, but complains, rather, that as a factual matter the partial difference in periods of exposure alone made consolidation improper and deprived it of a fair trial.

First of all, as the circuit court duly noted, the trial judge carefully and repeatedly instructed the jury to treat each case separately:

> Instructions were given throughout the trial and in the charge to caution the jury to consider each plaintiff's claims individually. Two separate verdict forms were provided to the jury, one for Johnson, the other for Higgins . . . . [T]he court acted throughout in a manner which insured that each plaintiff's claim was considered separately.

Pet. App. 37a.

Moreover, there is no reason to suppose that the jury was not equal to the task of

evaluating each case independently from the other. Nor was there any lack of evidence of Celotex's wrongdoing during the years of Mr. Johnson's exposure. See Point I, supra. In short, there is no basis for the suggestion that the jury was in any way influenced by the Higgins-only proofs when it rendered the altogether proper verdict for Mr. Johnson.

But more to the point, a factual inquiry into the pros and cons of a trial judge's consolidation of two cases with obvious and overriding similarities is hardly the kind of exercise worthy of this Court's attention. Here, the Second Circuit carefully marshalled the law and the facts, and concluded unanimously that consolidation was proper. A review by this Court would frankly be a waste of its time.

CONCLUSION

For the foregoing reasons, respondents urge that the Petition for A Writ of Certiorari be denied in all respects.

Respectfully submitted,

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(3)

No. 90-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,

Petitioner,

—v.—

JOHN E. JOHNSON, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. THE SECOND CIRCUIT MAJORITY MISAPPREHENDED AND MISAPPLIED CONTROLLING STATE LAW	1
A. Review of the Second Circuit's Published Opinion Will Be of Precedential Value	3
II. THE SECOND CIRCUIT MAJORITY DID NOT CONSIDER CELOTEX'S ACTUAL KNOWLEDGE IN SUSTAINING THE PUNITIVE AWARD AT BAR	4
A. The Ritterhoff Deposition	6
B. The State of the Art Proofs	8
III. THE CONSOLIDATION WAS MANIFESTLY PREJUDICIAL	9

TABLE OF AUTHORITIES

Cases:	PAGE
Cleghorn v. New York Cen. & H. River R.R., 56 N.Y. 44 (1874)	2-3
Feldman v. Lederle Laboratories, 97 N.J. 429, 454, 479 A.2d 374, 387 (1984)	9
Higgins v. The Celotex Corp., No. CV-87-0537 (S.D.N.Y.)	9
In re Joint Eastern and Southern Districts Asbestos Litigation, No. CV-87-0537, slip op. (S.D.N.Y. August 23, 1990) [included in Petitioner's Lodging as Appendix 5]	10
Johnson v. The Celotex Corp., Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990) (Carman, U.S.C.I.T., sitting by designation, [original] opinion of the court) [reprinted in the appendix to the petition at Pet. App. 1a-22a]	3, 6
Johnson v. The Celotex Corp., Nos. 89-7484, 89-7542, slip op. (2d Cir. March 20, 1990) (Mahoney, C.J., [original opinion] concurring in part and dissenting in part) [reprinted at Pet. App. 22a-26a]	1, 6
Johnson v. The Celotex Corp., 899 F.2d 1281 (2d Cir. 1990) ["corrected" majority opinion and "revised" concurrence and dissent] [reprinted at Pet. App. 28a-49a and 49a-52a, respectively]	1, 3, 6, 9
Magagnos v. Brooklyn Heights R.R., 128 A.D. 182, 112 N.Y.S. 637 (N.Y. App. Div. 1908)	2
Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967)	1, 9

PAGE

Soucy v. Greyhound Corp., 27 A.D.2d 112, 276 N.Y.S.2d 173 (N.Y. App. Div. 1967)..... 2

Rule:

Sup. Ct. R. 10.1(a)..... 4

Miscellaneous Authorities:

Brown, *Industrial Hygiene and the Navy in National Defense* (presented at 5th Ann. Meeting of the Air Hygiene Found. of Am., Inc., Nov. 13, 1940) [included in Petitioner's Lodging under Appendix 4] 4-5

I. THE SECOND CIRCUIT MAJORITY MISAPPREHENDED AND MISAPPLIED CONTROLLING STATE LAW

Respondents' argument that "it is nothing short of specious" and "disingenuous at best" for petitioner to claim that the case at bar presents an issue of "controlling state law,"[1] fails to acknowledge that Circuit Judge Mahoney dissented on the ground that the majority failed to follow the applicable state law. See Petition at 10-11. [Hereinafter "Pet. at ____"]. Moreover, respondent does not seem to understand that raising the Second Circuit's "misapprehension and misapplication" of the controlling New York law is not synonymous with asserting a misstatement of that law. Celotex's petition does not claim that the district court or the Second Circuit majority misstated the New York evidentiary standard as permitting imposition of punitive damages for merely negligent—rather than reckless—conduct by a defendant. Pet. at 8. Rather, petitioner maintains that although the Second Circuit majority was correct in stating that a showing of at least "wanton or reckless" conduct is required for imposition of punitive damages, it did not understand (*i.e*, misapprehended) and correctly apply the New York standard fully described in the applicable Second Circuit precedent, *Roginsky v. Richardson-Merrell, Inc.*[2] If the majority understood and correctly applied the New York standard, it would not have sustained an award of punitive damages against Celotex based upon a recital of evidence irrelevant to the punitive damages issue before it, *i.e*, evidence which did not concern Celotex's actual knowledge between 1942 and 1945 of the risks its finished asbestos product posed to "bystanders" like plaintiff Johnson.[3]

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1 See Respondents' Brief in Opposition at 13; 9. [Hereinafter cited as "Opp. at ____"]. See also Opp. at 1, 8 and 19.

2 378 F.2d 832 (2d Cir. 1967). See Pet. at 8-15. One might, however, say that the majority did not *adequately* state the New York standard since its opinion, unlike that of Judge Mahoney, did not note that the "reckless" conduct necessary to sustain an award of punitive damages under New York law is considerably more egregious than the type of conduct which the common law would characterize with that term. See Pet. at 10-11 & nn.28 & 29; at 13 n.33.

3 See Point II *infra*. See also Pet. at 13-15; Judge Mahoney's opinion at Pet. App. 24a-26a and 51a-52a.

Respondents' suggestion that New York law permits imposition of punitive damages for grossly negligent conduct is not supported by the decisions they cite.[4]

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4 Apparently reluctant to state the proposition positively, "[r]espondents do not concede that gross negligence alone is an insufficient basis for punitive damages, as there are, indeed, New York authorities to this effect." See Opp. at 13, n.7. The two cases respondents cite, however, do not support that proposition.

Soucy v. Greyhound Corp., 27 A.D.2d 112, 276 N.Y.S.2d 173 (N.Y. App. Div. 1967) involved an appeal from a trial court order granting plaintiffs-respondents leave to file an amended complaint to add an exemplary damages claim. "[The trial court] in granting leave to amend held that 'exemplary damages may be awarded in actions for personal injuries where the negligence is so gross and culpable *as to evince utter recklessness*. . . .' " *Id.*, 276 N.Y.S.2d at 175 (emphasis supplied). The *Soucy* court affirmed, stating: "We find no merit in appellant's contention that exemplary damages are not allowable in personal injury actions based on negligence if such negligence amounts to flagrant misconduct." *Id.* "Moreover, while *actual malice is a requisite to the allowance of punitive damages* such may be established not only by showing 'that the tort was committed to gratify some actual grudge or ill will . . . [but also] by showing *that it was committed recklessly or wantonly*. . . .' " *Id.*, 276 N.Y.S.2d at 175 (emphasis supplied) (quoting *Magagnos v. Brooklyn Heights R.R.*, 128 A.D. 182, 183, 112 N.Y.S. 637, 638 (N.Y. App. Div. 1908)).

In *Cleghorn v. New York Cen. & H. River R.R.*, 56 N.Y. 44 (1874), the court reversed a judgment in favor of plaintiff and granted a new trial on the ground that the trial court erred in failing to instruct the jury that it could not award exemplary damages against the defendant railroad for the acts of its switchman absent a finding that the railroad was "chargeable with gross misconduct." *Id.* at 47. "Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, *knowing that he was incompetent*, or, from bad habits, unfit for the position he occupied. *Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established.*" *Id.* at 47-48. "If a railroad company, for instance, *knowingly and wantonly* employs a drunken engineer, or switchman, or retains one *after knowledge of his habits is clearly brought home to the company* . . . and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages. . . ." *Id.* at 48 (emphasis supplied). Respondents might have been misled by the *Cleghorn* court's use of the phrase "gross negligence" rather than "gross misconduct" in a brief passage holding "competent" on the punitive damages issue, evidence that the switchman "was a man of intemperate habits, which were known by the agent of the [railroad], having the power to employ and discharge him and other subordinates." *Id.* at 46-47. "[T]he evidence was com-

Much of respondents' argument goes to the proposition that since petitioner "concedes" that the trial court correctly charged the jury regarding imposition of punitive damages, the punitive award at bar is unassailable. See, e.g., Opp. at 8-9; 13 n.7. Respondents fail to understand petitioner's basic argument that Celotex was entitled to have the Second Circuit review the jury's verdict through the proper application of the controlling New York standard. The mere fact that the district court, and even the Second Circuit, correctly stated that standard does not prove that the punitive award at bar is supported by legally sufficient evidence. See Pet. at 8-19.

A. Review of the Second Circuit's Published Opinion Will Be Of Precedential Value

As a consequence of their erroneous argument that the case at bar involves no issue of controlling state law, respondents maintain that review by this Court of the opinion below will be of "absolutely no precedential value." Opp. at 19. Since the "corrected" majority opinion below has been published, 899 F.2d 1281, its misapprehension and misapplication of New York punitive damages and state of the art law will misguide district courts currently adjudicating a tremendous number of actions in which punitive damages have been demanded. See Pet. App. 3a-4a, 30a-31a. Moreover, it will serve as an erroneous precedent as to the consolidation issue. See Pet. at 19-24; Point III *infra*.

Even if the opinion below had not been published, action by this Court short of plenary consideration is warranted as an exercise of this Court's supervisory powers to correct a seriously and undoubtedly erroneous decision which the Second Circuit refused to address in a forthright manner, let alone correct.[5] The decision below does not present an historic constitutional issue, but, given its patently erroneous nature, neither will it require a substantial amount of this

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petent upon the question of gross negligence on the part of the defendant in employing or continuing the employment of a subordinate known to be unfit for his position. . . ." *Id.* at 47. That passage, however, does indicate that the defendant's actual knowledge was required. See Pet. at 10.

5 See Pet. at 15 & n.37; 25. See also Pet. at 6-7; 9-15.

Court's valuable time to evaluate and correct. Petitioner respectfully maintains that the Second Circuit majority's adjudication of the case at bar falls far below the standard which this Court should require of a United States court of appeals. See Rule 10.1(a)

II. THE SECOND CIRCUIT MAJORITY DID NOT CONSIDER CELOTEX'S ACTUAL KNOWLEDGE IN SUSTAINING THE PUNITIVE AWARD AT BAR

Respondents accuse petitioner of "purport[ing] to read the circuit judges' minds" in asserting that the Second Circuit majority 'did not consider what Celotex actually knew' in reviewing the award of punitive damages. Opp. at 16 (quoting Pet. at 13). Since Celotex did not wish to engage in that practice, its petition addresses the language used in the majority opinion—language which the majority twice approved. See Pet. at 14 n.34. That language does not indicate that the majority reviewed the award with respect to Celotex's actual knowledge at the time of plaintiff Johnson's employment of the risks its finished, hardbound asbestos products posed to shipyard workers experiencing bystander exposure. Rather, the majority, erroneously applying a negligence standard, focused upon what Celotex "should have known" based upon what others knew, "suspected," or "considered to be probable." See Pet. at 13-14; 11-12. Moreover, the punitive damages proofs mentioned in the majority opinion pertain to workers in "asbestos processing plants" who had "direct and sustained exposure to high concentration levels of asbestos fibers," not to "bystanders" like Johnson who did not personally use asbestos products and was exposed to lower concentration levels of asbestos fibers. See Pet. at 14-15. The only evidence respondents cite in support of their argument that the record supports an award of punitive damages in favor of shipyard workers like Mr. Johnson rather than just "plantworkers" is inapposite.[6]

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6 See Opp. at 17-18; 5 n.6, par. 2 (citing Jt. App. 2625, 2634). The paper cited, Brown, *Industrial Hygiene and the Navy in National Defense*, (presented at 5th Ann. Meeting of the Air Hygiene Foundation of Am., Inc., Nov. 13, 1940), concerns workers with direct exposure to asbestos: "Asbes-

Respondents, on the other hand seem to engage in mind-reading in assuming that in making "explicit reference to 'other evidence presented' as further basis for sustaining the verdict," the Second Circuit majority "[u]ndoubtedly" must have been referring to "testimony regarding Celotex's actual knowledge of the hazards of its product."[7]

It is highly unlikely that a court applying the correct legal standard for the imposition of punitive damages would recount at some length evidence irrelevant to the question before it, see Pet. at 13-15, and then refer to the relevant proofs with the phrase "other evidence presented." Contrary to respondents' assertions, the petition does not advance "the absurd view that . . . [the Second Circuit] was required to list and describe every single shred of proof that tended to support the verdict." Opp. at 16. Rather, petitioner maintains that the fact that the majority discussed only evidence irrelevant to the punitive damages issue Celotex raised supports the conclusion that the majority misapprehended and misapplied the controlling New York law. See Pet. at 8-9, 13-15. A court which understood and knew how to apply the controlling legal principle certainly need not have discussed "every single shred of proof," but it would have referred—even in broad terms—to some relevant evidence. This is especially true if one accepts respondents' proposition that one should presume Judge Carman's familiarity with the entire record. Opp. at 15, lines 18-20. According dissenting Circuit Judge Mahoney the same presumption of familiarity with the record, one must note that jurist's express statement that the "record contains *no* evidence" to support plaintiff Johnson's

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tosis: This is a potential occupational disease hazard . . . among workers engaged in *the manufacture* of asbestos insulating covers for flanges, valves and . . . turbines. I recently conducted a medical survey of the workers of *the pipe insulating shop* of the New York Navy Yard, inclusive of roentgen studies. The maximum working period of exposure was [17] years. *No cases of asbestosis were found.*" *Id.* at 2634 (emphasis supplied). See also *id.* at 2633 (par. 1(b)) (regarding "makers of pipe insulating covers.") See Appendix 4 of "Petitioner's Lodging" submitted with this brief [hereinafter cited as "Pet. Lodg., app. _____"].

7 Opp. at 16. See also Opp. at 18 ("As the Second Circuit, no doubt, concluded in upholding the punitive damage award. . . .")

punitive award against Celotex. Pet. App. 25a; 52a (emphasis in original). See Pet. at 13-15 and 18.

A. The Ritterhoff Deposition

Respondents claim that the "other evidence" required to sustain the punitive award at bar appears in the deposition testimony of their medical expert Dr. Robert Ritterhoff. See, e.g., Opp. at 3-4. Continuing the shrill tone which characterized their efforts at trial,[8] respondents accuse petitioner of failing to reveal to this Court a "crucial fact" from that deposition which shows that petitioner's corporate predecessor had actual knowledge of "the dangers of its product" by 1944. See Opp. at 3-4; 9-10; 14 & nn.8 & 9; 15. Since respondents have not provided the document they cite, petitioner has lodged it with the Court[9] to show that it does not support respondents' contention and that it is in any event irrelevant to the case at bar.

Respondents cite to pages 25-47 of the deposition for the proposition that "the proofs soundly established that Carey had, indeed, actual and concrete knowledge of the deadly characteristics of its asbestos product before and during the time Mr. Johnson was exposed." Opp. at 3-4 & nn.5 & 6. Respondents state that Dr. Ritterhoff performed an autopsy on a Carey worker (Herbert Scobie) in 1944, "concluded that the man's death was due to asbestos" and specifically warned Carey, through an appropriate corporate official, of his findings." Opp. at 3-4. Contrary to respondents' assertions, it is not clear that Dr. Ritterhoff contacted any Philip Carey official "before or during" Mr. Johnson's 1942-45 employment at the Brooklyn Navy Yard.[10] Respondents' assertion that Dr.

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8 As recounted in part in the majority opinion below, respondents referred to defendants, their witnesses and attorneys as, *inter alia*: "liar[s]," "sleaze," "evil" and "vicious." Pet. App. 19a; 46a. The Second Circuit rejected defendants' arguments that those comments as well as the conduct of the district court judge warranted a new trial. Pet. App. 20a, 21a; 47a, 48a.

9 See Pet. Lodg., app. 1.

10 Although the autopsy referred to was performed on an unspecified date in 1944, Dr. Ritterhoff stated that he believes he did not speak to the

Ritterhoff informed "an appropriate corporate official" also finds no support in the record.[11] Moreover, Dr. Ritterhoff concluded that the subject's asbestosis alone could not have resulted in death.[12] Furthermore, since Dr. Ritterhoff's findings are based upon a worker employed for 25 years in an asbestos product manufacturing plant,[13] they are irrelevant to the case at bar since Mr. Johnson experienced only "bystander exposure" to finished asbestos products used by others. See Pet. at 14-15 & nn.35 & 36.

Even if the Ritterhoff deposition factually supported respondents' assertions, it would not justify imposition of punitive damages against petitioner in the case at bar. Estab-

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Carey official until after preparation or actual publication—in 1946—of an article reporting his findings. See Pet. Lodg., app. 1 at 37, lines 3-13 (Dr. Ritterhoff "would say" that he spoke to an unidentified man at Phillip (sic) Carey about the autopsy of Herbert Scobie "after everything was written up" or after that paper was published in the Jan., Mar. and May 1946 edition of the Am. J. of Pathology.) See Pet. Lodg., app. 1 at 57-69 (article is deposition exhibit no. 6); app. 2 (a more legible copy of the article). See also app. 1 at 37, lines 3-13; at 44, line 18 to 45, line 17 (wherein Dr. Ritterhoff states, *inter alia*, that he does not know whether he spoke to the Carey official within one year before or after publication of the article); at 45 (in response to a question Dr. Ritterhoff states that he "would guess" "it" [the visit or publication?] was within six months of the autopsy); at 58 (article marked "Received for publication May 9, 1945"); at 50 (December 23, 1944 letter referring to additional tests to be conducted before article is written).

11 In the deposition testimony cited by respondents, Dr. Ritterhoff states that he spoke with someone at a Phillip (sic) Carey office in Cincinnati, but he does not identify that person by name or title. See Pet. Lodg., app. 1 at 37; 38, lines 4-5 ("I don't know the man. I don't remember the name. I'm sure I was told the name, but I don't remember it), lines 15-16 ("He was a kindly gentleman, gray-haired. That's all I remember.")

12 Although Dr. Ritterhoff at first erroneously believed asbestosis was a significant, but not the primary, cause of Mr. Scobie's illness, following consultation with a more experienced pathologist who stressed an apparently viral disease also present in the subject, sarcoidosis, Dr. Ritterhoff concluded that the subject's asbestosis alone could not have resulted in death. See Pet. Lodg., app. 1 at 50; 52; 61-62 (pp. 499-500 of article). Dr. Ritterhoff's deposition testimony that he told "Carey" that Scobie's death was due to asbestosis, see *id.* at 37, is inexplicable given the material discussed above, and irrelevant given the date thereof. See n.10 *supra*.

13 See Pet. Lodg., app. 1 at 59, or app. 2 at 494.

lishing a defendant's actual knowledge of a specific risk to workers with direct and sustained asbestos exposure does not establish actual knowledge of a risk to bystander workers like Johnson who experienced much lower level exposure. Indeed, petitioner did not have even constructive knowledge of any risk to Johnson; the "state of the art" at the time of his employment (1942-45) indicated that he was not at risk. See Pet. at 18-19. Moreover, even in the mid-1960s the state of the art indicated that insulators—who personally used asbestos-containing products—were generally not at risk.[14]

B. The State of the Art Proofs

In addition to defending their punitive award on the basis of proofs like the Ritterhoff deposition supposedly within Celotex's "actual knowledge," respondents also refer to "state of the art proofs" which they maintain permit imposition of those damages. The medical studies cited in support of that argument, however, establish only constructive knowledge of risks unrelated to those at bar.[15] Indeed, respondents,

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14 See, e.g., the testimony of plaintiffs' expert Dr. David Ozonoff: In a "landmark" study published in 1965—20 years after respondent Johnson's last occupational exposure to asbestos—Dr. Irving Selikoff stated that insulators were generally exposed to no more than the Threshold Limit Value of 5 million asbestos particles per cubic foot of air [hereinafter "TLV of 5"] established by the American Conference of Governmental and Industrial Hygienists ("ACGIH"). Pet. Lodg., app. 3 at 1152-1155. Daily occupational exposure (8 hours a day, 40 hours per week) to airborne asbestos not exceeding the TLV of 5 was considered safe, *i.e*, workers were not expected to become sick from it during their careers. *Id.* at 1145-1146; 1150-1151 (reference to 1965 and 1953 studies). The ACGIH's TLV of 5 was the standard accepted by the federal and most state governments. *Id.* at 1147-48. [See also Jt. App. 2689-2696 at 2695 (U.S. Navy's standard for 1964)]. It remained the standard until the late 1960s or early 1970s. Pet. Lodg., app. 3 at 1146-1147.

15 See Opp. at 4-6 & n.6. The studies discussed at Jt. App. 1191-1192 and 1085 involved workers who, unlike "bystander" Johnson, personally worked with asbestos and experienced "high dose exposure." Respondents' reference to Jt. App. 2625-2634 is also inapposite. See discussion at n.6 *supra*. Jt. App. 1089-1090 concerns reports linking asbestosis and cancer in workers directly handling asbestos (e.g., pipe insulators). Mr. Johnson has neither asbestosis nor cancer. See *infra* n.19. Jt. App. 1304 also concerns cancer. Respondents' other appendix references are obviously too general to

quoting an irrelevant jury instruction, expressly argue contrary to New York law that petitioner could have been found reckless for failing to warn of "suspected" or "possibl[e]" risks unrelated to those at bar.[16] That argument, which confuses the standard for awarding compensatory damages with the more stringent standard for imposing punitive damages, tends to prove that both the punitive and compensatory awards at bar were improper.[17]

Like the Second Circuit majority, respondents erroneously assume that once a defendant knows of a single instance of harm caused by asbestos it has actual knowledge of all other "dangers of asbestos,"[18] even those not yet revealed through research performed by the medical, scientific and industrial community and, therefore, not within the "state of the art." As Judge Mahoney observed: "This is hardly the 'recklessness . . . close to criminality' which we described in *Roginsky* as the standard for awarding punitive damages under New York law." Pet. App. 52a.

III. THE CONSOLIDATION WAS MANIFESTLY PREJUDICIAL

In defending the consolidation for trial of the *Johnson* and *Higgins* cases, respondents depart from the facts of record but do not deny that their own expert described Mr. Johnson

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constitute proofs sufficient to sustain a punitive award against Celotex: 1114-1115 (long latency period); 1085-1088 (asbestos diseases of concern to British government); 1259, 1263-1269 (medical reports from U.S.P.H.S); 1301 (Dr. Becklake "has stature").

16 Opp. at 18-19 (quoting Jt. App. 2106). That portion of the jury charge discusses when a product should be deemed "defective" due to lack of an adequate warning. See Pet. Lodg., app. 4 at 2103-2106.

17 Since the "state of the art" for 1942-45 indicated that a "bystander" like Johnson was not at risk from his low level exposure to asbestos, see Pet. at 18-19 and n.6 *supra*, petitioner could only have "warned" him of that fact and perhaps also stated that dissimilar workers experiencing direct, high level exposure over the TLV of 5 were at risk. See nn.14 & 15 *supra*. Can one logically say that such a warning would have prevented the injury at bar? *See Feldman v. Lederle Laboratories*, 97 N.J. 429, 454, 479 A.2d 374, 387 (1984) ("A warning that a product may have an unknowable danger warns one of nothing.") See also Pet. at 22 n.58.

18 See, e.g., Opp. at 3, 4, 10, 14-20.

as "essentially a well man,"[19] or that the two plaintiffs had entirely different periods of product exposure. See Pet. at 21.

Respondents repeat the point noted in the petition that the trial court instructed the jury to consider Mr. Johnson's and Mr. Higgins' claims separately,[20] but respondents do not address or refute petitioner's contention that the jury's improper application of Higgins' proofs to Johnson's claim is indisputably demonstrated by its verdict which found a similar duty to warn as to both plaintiffs, and awarded almost identical punitive damages.[21] Furthermore, the application of Higgins' proofs to Johnson's claim was especially prejudicial to Celotex which was not properly a party to *Higgins*.[22]

Respectfully submitted,

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19 See Opp. at 2 n.2. See also Pet. at 22 (regarding Higgins' death). Since space does not permit Celotex to fully address what it perceives as respondents' mischaracterization of the record regarding Mr. Johnson's medical condition, petitioner has lodged with the Court copies of relevant pages of the Second Circuit joint appendix cited by the parties. See, e.g., Jt. App. 715 and Pet. at 19 n.44 (Johnson does not have asbestosis). See, e.g., Jt. App. 677 (plaintiff's expert stating that Mr. Johnson does not have cancer); 2118 (jury instructed that "No claim is made here that there is a reasonable likelihood that Mr. Johnson will develop cancer and, accordingly, you should make no award to compensate for any pain or expense associated with that illness. . . .") [See Pet. Lodg., app. 4].

20 Opp. at 23. See also Pet. at 22 & n.57.

21 See Pet. at 22 & n.58; 23.

22 *In re Joint Eastern and Southern Districts Asbestos Litigation*, No. CV-87-0537 [*Higgins*], slip op. at 12 (S.D.N.Y. Aug. 23, 1990). See Pet. Lodg., app. 5.